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## Presidential Factfinding

Shalev Roisman

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## Presidential Factfinding

*Shalev Roisman\**

*The modern President possesses enormous power. She can use military force abroad without congressional authorization, impose economic sanctions on foreign powers, or enter into trade agreements with foreign states. She can do all this on her own, with little constraint. Or so it seems. In reality, these important powers, along with numerous more mundane ones, are all contingent on the President first making certain factual determinations. For example, to use force abroad, the President must first determine that the use of force is in the “national interest,” perhaps that it will preserve “regional stability” or protect American lives. To impose sanctions, she might have to determine that a country has used chemical weapons against its own people. To remove an officer with for-cause protection, she must find that there was “cause,” such as “inefficiency, neglect of duty, or malfeasance.” Given that the President can only invoke these powers—and many, many others—when certain facts exist, the process and standard of certainty the President uses to find such facts can have enormous consequences. The phenomenon of presidential factfinding is thus both commonplace and important. It is also almost entirely unstudied.*

*This Article establishes the importance of factfinding as a pervasive feature of presidential power spanning constitutional,*

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*statutory, and international law. The Article then examines the President’s existing obligations in conducting factfinding, arguing that the President has a constitutional duty to act, at the least, honestly and based on reasonable inquiry. Finally, it addresses how presidential factfinding ought to be structured and regulated internally within the executive branch, by Congress, and through judicial review.*

INTRODUCTION..... 827

I. THE FIELD OF PRESIDENTIAL FACTFINDING ..... 833

    A. *Constitutional Law* ..... 834

    B. *Statutory Law* ..... 837

    C. *International Law* ..... 844

    D. *A Taxonomy of Presidential Factfinding* ..... 845

        1. Pure Fact Powers ..... 846

        2. Mixed Fact and Policy Powers ..... 847

        3. Pure Discretion Powers ..... 851

II. THE POSITIVE OBLIGATIONS ON PRESIDENTIAL FACTFINDING ..... 852

    A. *Text* ..... 854

    B. *Structure* ..... 857

        1. General Structural Reasons ..... 857

        2. The President as Information-Gatherer ..... 859

    C. *Supreme Court Precedent* ..... 861

    D. *Historical Practice* ..... 865

    E. *Does the Duty Have Bite?* ..... 871

III. REGULATING PRESIDENTIAL FACTFINDING ..... 873

    A. *Executive Branch Regulation of Presidential Factfinding* ..... 873

        1. Process ..... 874

        2. Certainty ..... 889

    B. *Congressional Regulation of Presidential Factfinding* ..... 892

    C. *Judicial Review of Presidential Factfinding* ..... 894

        1. Process-Based Deference ..... 896

        2. Hard Look Review ..... 897

        3. Contextual Deference ..... 899

CONCLUSION ..... 903

## INTRODUCTION

The President is a factfinder. We do not typically think of her in that way, but it's true. In a wide array of areas, before the President can exercise power, she must first find certain facts. Take a few examples:

- To use military force abroad without congressional authorization, the President must find that such force would promote important “national interests,” such as saving American lives abroad or preserving “regional stability.”<sup>1</sup>
- To impose certain sanctions on foreign states, the President must find that the state has used “chemical or biological weapons against its own nationals.”<sup>2</sup>
- To enter into certain trade agreements, the President must first conclude that foreign duties are “unduly burdening and restricting the foreign trade of the United States” and that the agreements will promote particular “purposes, policies, priorities, and objectives” dictated by Congress.<sup>3</sup>
- To bar the entry of certain classes of aliens into the country, the President must first find that their entry would be “detrimental to the interests of the United States.”<sup>4</sup>
- To remove an officer with “for cause” removal protection, the President must find that there was “cause,” such as “inefficiency, neglect of duty, or malfeasance.”<sup>5</sup>

These powers are far from unique. To the contrary, presidential power contingent on finding certain facts is a truly pervasive feature of constitutional, statutory, and international law. And given that presidents can only invoke these powers upon finding certain facts, the process and standard of certainty the President uses to find such facts can have enormous consequences. Presidential factfinding is thus both commonplace and important. Yet, it is also almost entirely unstudied.

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1. See, e.g., Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at \*10 (2011); Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 756 (2016).

2. 22 U.S.C. § 5604(a) (2012).

3. 19 U.S.C. § 4202 (2012).

4. 8 U.S.C. § 1182(f) (2012).

5. See, e.g., 5 U.S.C. § 1202 (2012) (“Any member [of the Merit Systems Protection Board] may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786 (2013) (listing agency officials with statutory removal protection).

This Article seeks to change that. In doing so, it seeks to identify and help fill a gap in the literature and doctrine regarding presidential power. In many ways, the study of presidential power has largely been a study of its outer bounds and limits. This examination has often focused on determining which facts, if any, authorize the President to act. May the President seize certain steel mills, if such seizure is necessary to avert an emergency in the war-fighting effort?<sup>6</sup> May the President use military force abroad not only to protect American lives, but also to preserve regional stability, or even prevent humanitarian disasters?<sup>7</sup> Does the 2001 congressional authorization to use force against al Qaeda include the power to use force against groups that merely “significantly support” al Qaeda, or is it limited to groups that actively fight alongside al Qaeda against the United States?<sup>8</sup> And so on. In many ways, a core part of public law scholarship and doctrine relating to presidential power has been about which facts authorize the President to exert power.<sup>9</sup> But after one determines which facts authorize the President to act, key questions remain: *How must and how should the President go about finding these facts?* To date, we have not asked or answered these questions in any systematic way.<sup>10</sup> This Article seeks to do just that.

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6. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

7. See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 658–60 (6th ed. 2017) (remarking that “[t]here is general agreement that . . . the President has the power to repel attacks on the United States” and “to use force to protect the lives and property of U.S. citizens abroad”); *id.* at 664 (questioning whether “prevent[ing] a humanitarian catastrophe” or “preserving regional stability” and “supporting the U.N. Security Council’s credibility and effectiveness” are the types of “national interests” that warrant unilateral presidential uses of force).

8. See Rebecca Ingber, *Co-Belligerency*, 42 *YALE J. INT’L L.* 67, 85 (2017); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2109 (2005) (discussing the scope of 2001 Authorization for Use of Military Force).

9. An alternative line of recent scholarship focuses on the structure of executive branch legal decisionmaking, providing valuable work on how the President determines and ought to determine what the law is. *E.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *COLUM. L. REV.* 1448 (2010); Daphna Renan, *The Law Presidents Make*, 103 *VA. L. REV.* 805 (2017). But once one determines what the law is, one must apply it to the *facts*. And facts must be found.

10. Some recent scholarship has certainly touched on presidential factfinding. The most relevant scholarship has focused exclusively on judicial deference to factfinding, specifically in the national security area. See, e.g., Robert M. Chesney, *National Security Fact Deference*, 95 *VA. L. REV.* 1361 (2009); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 *HASTINGS L.J.* 441 (2005). Kevin Stack perhaps comes the closest to answering how presidential factfinding ought to be reviewed by courts across subject-matter domains, but he does not address the President’s first-order legal obligations in finding facts, does not focus on factfinding in particular (as opposed to all questions of law, fact, and mixed fact and law), and excludes from his analysis constitutional exercises of authority, which frequently contain factfinding obligations. See Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*,

Indeed, despite the lack of focus on these questions, answering them is extremely important. As we know from numerous areas of law, a factfinder's decision often hinges on the process she uses to find relevant facts and the level of certainty she must have that those facts exist. This intuitive notion forms the basic premise of the study of civil procedure, criminal procedure, administrative law, and institutional design, to name a few examples.<sup>11</sup> It has also been the driving force behind the scholarly project critiquing how Congress, courts, and, for a time, agencies found so-called "legislative facts" without any sort of standard or rigorous process.<sup>12</sup> In fact, ensuring appropriate procedures for *agency* factfinding was one of the foundational concerns about the administrative state at its inception.<sup>13</sup> Yet, conspicuously left out of this

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62 VAND. L. REV. 1171, 1209 (2009) [hereinafter Stack, *Reviewability*]; see also Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982) (focusing on judicial review of exercises of statutory authority affecting private rights but not focusing on factfinding); David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1066 (2018) (focusing on judicial review of statutory executive orders, but excluding constitutional authorities, and not focusing on factfinding). Matthew Waxman provides an interesting account of the President's first-order factfinding obligations, but he does so with respect to the discrete questions *under international law* of when the executive can detain suspected enemy combatants or attack states suspected of having weapons of mass destruction. See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) [hereinafter Waxman, *Detention*]; Matthew C. Waxman, *The Use of Force Against States That Might Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1 (2009).

11. The consequential nature of procedure is well known. See, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) ("[I]t is procedure that marks much of the difference between rule by law and rule by fiat."); *Regulatory Reform Act of 1983: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell) ("I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1439 (2011) (noting familiar procedural ways in which institutional design is used to shape decisionmaking by public officials).

12. See, e.g., 3 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15:9 (2d ed. 1980) (critiquing and assessing judicial and agency legislative factfinding); DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS* 3, 167 (2008) (critiquing the Supreme Court's "failure to account for the empirical world" and arguing for a "coherent and consistent theory of constitutional factfinding"); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170 (2001) (noting that "while Congress has superior factfinding capacities, it often lacks the institutional incentives to take factfinding seriously"); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 5 (2011) (noting judicial reliance on extrarecord facts that have not been thoroughly tested by the adversarial process); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018) (noting ubiquity of factfinding as predicate for congressional statutes and judicial rulings and arguing for courts to apply a more rigorous process for finding legislative facts).

13. See DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 3 (2014) ("The requirement of findings [of fact] may seem arcane. . . . Nonetheless, it is the key to understanding the twentieth century origins of the administrative state in America."); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 744 (2016) (reviewing ERNST, *supra*) ("[E]arly New Deal administration was marked by

scholarship critiquing how Congress, courts, and agencies find facts has been an exploration of how the *President* finds facts.<sup>14</sup> Once we combine the pervasive nature of presidential factfinding with the well-known notion that how facts are found can be outcome-determinative, we can see how important the study of presidential factfinding is.<sup>15</sup> Because the President's power frequently hinges on finding certain facts, how the President goes about finding those facts can make the difference between her having power and lacking it. As a result, to truly understand the scope of the President's power, we must understand not only which facts authorize her to act, but how she must and ought to go about finding them.<sup>16</sup>

Part I begins by demonstrating the pervasive nature of factfinding as a feature of presidential power. Presidential factfinding powers—by which I mean powers that require the President to first find certain facts before exercising an authority or duty—span constitutional, statutory, and international law, and range from the hot-button to the mundane. Indeed, it is hard to find an area of presidential power that does *not* contain authorities contingent on the President finding certain facts. After establishing the phenomenon's pervasiveness, the Article provides a taxonomy to explain how factfinding fits into presidential power. Presidential powers can be divided into what I call "Pure Fact," "Mixed Fact and Policy," and "Pure Discretion" powers. Factfinding forms a core part of Pure Fact and Mixed Fact and Policy powers, but not of Pure Discretion powers. As a result, the positive and normative analysis that follows applies to these first two categories but not the third.

But what *are* the President's positive legal obligations in finding facts before exercising authority?<sup>17</sup> Based on conventional sources of

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two . . . worrisome signs — an absence of rigorous factfinding and almost limitless legislative delegations.”).

14. See, e.g., Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931 (1980) (discussing legislative, judicial, and administrative—but not presidential—lawmaking reliant on factfinding).

15. Cf. 3 DAVIS, *supra* note 12, § 15:8, at 160 (“Hardly anything about law can be more fundamental than the facts that lawmakers use, the ways that lawmakers get their facts, and the procedures that lawmakers use for allowing affected persons to submit facts to lawmakers and to challenge facts that lawmakers are using.”).

16. See, e.g., Waxman, *Detention*, *supra* note 10, at 1381 (noting “analytic inextricability of the standard-of-certainty question and the substantive issue to be proven”); cf. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1347 (1979) (same).

17. As noted *supra* note 10, scholars have not yet provided an account of the President's first-order legal obligations in how she finds facts. Neither have courts. Courts do not typically review instances of presidential factfinding because of a variety of standing, justiciability, and deference doctrines. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical*

constitutional interpretation, including the Constitution's text, structure, Supreme Court precedent, and historical practice, Part II argues that the President has a constitutional duty to be honest and engage in reasonable inquiry when finding facts that are predicates for exercising power. Although this duty may not seem overly onerous, it is not illusory. Such a duty renders the exercise of presidential power *unconstitutional* when the factfinding serving as a predicate for such authority is dishonest or conducted without at least minimal evidentiary support, reasonable process, or consideration of available and appropriate evidence. And unfortunately there are numerous examples of historic presidential factfinding that do not meet even these relatively modest standards.<sup>18</sup>

Having set forth the descriptive scope of the phenomenon of presidential factfinding and the President's existing obligations in finding facts, Part III turns to the question of how presidential factfinding ought to be regulated. First, it explores how the President does and ought to regulate presidential factfinding within the executive branch. This question is crucial because, unlike power exercised by agencies, the Administrative Procedure Act's ("APA") requirements and judicial review provisions do not apply to the President.<sup>19</sup> And

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*Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1098 (2013) ("A variety of justiciability limitations . . . are regularly invoked by courts as a basis for declining to resolve issues of presidential power, especially when individual rights are not directly implicated."); Stack, *Reviewability*, *supra* note 10, at 1173–77 (explaining that current doctrine "operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power"). *But see* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. (forthcoming 2019) (manuscript at 7, 41–42, 52) (noting increase in judicial review of presidential orders under President Trump and predicting increase will likely be "the new normal"). This is particularly true because many presidential factfinding authorities will be exercised in foreign affairs and national security contexts where individual rights are unlikely to be implicated. *See, e.g.*, Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 814 (2016). And even in the instances where courts *have* reviewed presidential factfinding, they have failed to come up with any coherent view of how judicial review ought to be conducted, let alone of what the President's first-order obligations are. *See, e.g.*, Chesney, *supra* note 10, at 1366 ("[A] review of how [national security deference] claims have been addressed in actual practice suggests that litigants and judges lack a shared understanding of the nature of such claims and of the arguments that are relevant to resolving them."); Manheim & Watts, *supra* (manuscript at 6) ("[J]udicial precedents [do not] provide anything close to a well-developed or coherent legal framework for courts to follow when reviewing presidential orders."); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2037 (2015) (noting absence of "well-developed theory" of judicial review of executive orders); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 561–68 (2005) [hereinafter Stack, *Statutory*] (stating that courts have not settled on "character or scope" of deference to presidential assertions of statutory authority).

18. *See infra* Section II.E.

19. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").



presidential power is typically not subject to any other form of meaningful judicial review.<sup>20</sup> As a result, adherence to internal executive branch processes will often be the *only* meaningful check on presidential power. Yet, as this Part shows, there often appears to be *no* preset process or standard of certainty governing how the President finds facts. This Part argues that this presents a particularly dangerous state of affairs, that some preset process is normatively desirable to address this danger, and identifies options for how such processes or standards might be constructed.

The Article next briefly addresses how Congress might better define and enforce desirable limits on presidential factfinding, and then takes on the difficult task of identifying a desirable framework for judicial review of presidential factfinding. Appropriate judicial review must balance the role of courts in ensuring the President abides by her legal obligations with the need for appropriate deference to the President's institutional advantages of relative accountability and expertise. After explaining why accountability and epistemic rationales for deference ought not be presumed in exercises of presidential factfinding powers, the Article proposes three potential methods of judicial review—*process-based deference*, *hard look review*, and *contextual deference*—explains their benefits and costs, and suggests that process-based deference is likely the most realistic, desirable approach, at least as a preliminary matter.

This Article thus seeks to make three primary contributions to the literature. The first is to unearth presidential factfinding as a pervasive and deeply consequential feature of presidential power that is in need of serious study. The second is to establish that the President has existing legal obligations in how she finds facts and identify what those are. And the third is to make progress in identifying how presidential factfinding *ought* to be structured and regulated within the executive branch, by Congress, and by the courts.

In some ways, this project may seem particularly timely. The topic of presidential factfinding has arisen in the public sphere in an unusually heated way since the inauguration of President Trump. Many of President Trump's most controversial decisions have relied on presidential factfinding, including the so-called Travel Ban,<sup>21</sup> the

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20. See *supra* note 17.

21. The Travel Ban was premised on the finding that the entry of certain classes of aliens would be "detrimental to the interests of the United States." 8 U.S.C.A. § 1182(f) (West 2019); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); see also *infra* notes 178–180 (discussing the Travel Ban).

transgender military service ban,<sup>22</sup> the downsizing of certain national monuments,<sup>23</sup> the decertification of the Iran Deal,<sup>24</sup> and the movement of the American Embassy in Israel to Jerusalem.<sup>25</sup> And, going forward, presidential factfinding will surely continue to play an important role in challenges to Trump administration policies both inside and outside the courts.

But while presidential factfinding may seem particularly salient today, it is important to emphasize that there is nothing new about presidential factfinding as a core element of presidential power. Nor is there anything particularly novel about claims that presidents have not been fully truthful with the American public, including about deeply important things.<sup>26</sup> Presidential factfinding may have emerged as an area of particularly intense public debate recently, but it is a long-standing and deeply important feature of presidential power. The hope of this Article is to start treating it that way.

## I. THE FIELD OF PRESIDENTIAL FACTFINDING

This Part seeks to establish the pervasive nature of presidential factfinding. Before doing so, a few definitional and scope clarifications

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22. This policy was ostensibly based on the “expense and disruption” that transgender military service would cause, but was enjoined based, in part, on the inadequacy of the factfinding underlying the policy. *See, e.g., Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (“[T]he Presidential Memorandum [did not] identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.”).

23. President Trump based the downsizing on a claim that President Obama had not adequately adhered to the requirement that the national monument be “confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C.A. § 320301(b) (West 2019); Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

24. President Trump refused to certify the deal on the ground that the sanctions relief in the deal was not “appropriate and proportionate” to Iran’s actions and that the deal was not “vital to the national security interests of the United States,” but only after his cabinet apparently would not support his factual claim that Iran had not complied with the deal—another requirement for certification. *See* 42 U.S.C.A. § 2160e(d)(6)(A) (West 2019); Peter Baker, *Trump Recertifies Iran Nuclear Deal, but Only Reluctantly*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/politics/trump-iran-nuclear-deal-recertify.html> [<https://perma.cc/2NCN-LSKH>]; Donald J. Trump, U.S. President, Remarks by President Trump on Iran Strategy (Oct. 13, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-iran-strategy> [<https://perma.cc/MPR7-K9AJ>].

25. President Trump’s justification for moving the embassy was ostensibly predicated, at least in part, on the notion that he could not make the finding that keeping the embassy out of Jerusalem was “necessary to protect the national security interests of the United States.” Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 7, 109 Stat. 398, 400; *see* Donald J. Trump, U.S. President, Statement by President Trump on Jerusalem (Dec. 6, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/> [<https://perma.cc/L93Q-F2C8>].

26. *See infra* Section II.E.

are in order. First, for purposes of this Article, the term “presidential factfinding powers” refers to powers that require the President to first find certain facts before exercising an authority or duty. Second, the Article focuses specifically on delegations to the *President* rather than agency heads, as, unlike power delegated to agency heads, the President’s exercise of power is not governed by the APA.<sup>27</sup> Third, by “fact,” I mean a determination that some phenomenon exists or is likely to exist in the world. This definition is certainly debatable, and I do not mean for too much to ride on it.<sup>28</sup> One could broaden or narrow it, but whatever the definition, there are numerous presidential powers contingent on the President first making what can commonsensically be called a finding of “fact.” Finally, the purpose of this Part is to establish that the phenomenon of presidential factfinding is pervasive, but it is not meant to be exhaustive. There are simply too many examples to list them all. This Part should thus be thought of as a survey rather than a fully comprehensive list. At bottom, this Part shows that presidential factfinding powers span constitutional, statutory, and international law and range from the deeply consequential to the mundane. They are new. They are old. They really are everywhere.

### A. Constitutional Law

Presidential factfinding is a common feature of constitutional law. It is present in foreign policy, national security, and emergency powers, as well as more mundane powers, such as when to call Congress into a special session or recommend legislation.

To start with the more consequential authorities, before the President can use force abroad without congressional authorization, she must first conclude that such use of force is meant to further an “important national interest.”<sup>29</sup> The Office of Legal Counsel (“OLC”) has

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27. See *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (concluding that the APA does not apply to the President’s actions).

28. For other examples of how to define “fact” or “finding of fact,” see LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 548 (1965) (“A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.”); William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 894–97 (2013) (dividing congressional factfinding into “[e]mpirical facts . . . whose truth or falsity can be tested by experience or experiment in the world”; “[e]valuative facts,” which “are statements reflecting conclusions drawn from empirical facts”; and “[v]alue-based” facts, which “reflect a heavier component of value choice than empiricism”); and Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 72–73 (2013).

29. See, e.g., Auth. to Use Military Force in Libya, *supra* note 1, at \*6.

concluded that permissible “national interests” include protecting American lives and property abroad, preserving “regional stability,” maintaining the credibility of United Nations Security Council mandates, and, recently, mitigating humanitarian disasters.<sup>30</sup> Although debate continues over whether these or other predicates qualify as sufficient “national interests,”<sup>31</sup> the point is that no matter which determinations qualify, they are *all* predicated on the President finding facts—e.g., that the use of force is necessary for self-defense, to protect American lives, or preserve regional stability. Indeed, according to OLC, the one potential constitutionally based limit on the President’s authority to use force in defense of national interests is that such use of force cannot constitute a “war” for purposes of Article I’s Declare War Clause,<sup>32</sup> a determination that, itself, “requires a fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations.”<sup>33</sup>

Apart from use of force, the President must also find certain facts in order to settle American citizens’ claims against foreign states. In *Dames & Moore v. Regan*, the Supreme Court concluded that the President possesses the power to settle American citizens’ claims against foreign states where such settlement is “determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another.”<sup>34</sup> The President also has exclusive authority to recognize foreign governments, another authority that likely requires the President to find certain facts—i.e., that the “‘entity possesses the qualifications for statehood,’ including a defined territory, permanent population, government control, and capacity to engage in international relations.”<sup>35</sup>

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30. See April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 Op. O.L.C., 2018 WL 2760027, at \*10–11 (2018); Auth. to Use Military Force in Libya, *supra* note 1, at \*10.

31. See *supra* note 7; see also JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 6 (1993) (stating that the use of force authority only includes responding to “‘sudden attacks’ until there [is] time for Congress to convene and confer”); William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1342–43 (2006) (discussing views on when congressional authorization of military action is necessary).

32. U.S. CONST. art. I, § 8, cl. 8.

33. Auth. to Use Military Force in Libya, *supra* note 1, at \*8; see also Saikrishna Bangalore Prakash, *Military Force and Violence, but Neither War nor Hostilities*, 64 DRAKE L. REV. 995, 999 (2016) (“The war test . . . consists of a highly intensive facts-and-circumstances test . . .”).

34. 453 U.S. 654, 688 (1981). For scholarship on the debate over the scope of this authority, see, for example, Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1 (2003); and Adam S. Zimmerman, *Presidential Settlements*, 163 U. PA. L. REV. 1393, 1454–55 (2015).

35. Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 113–14 (2015) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 201, 202 cmt. a (AM. LAW INST. 1987)).

Many believe the President also has constitutional authority to act in emergency situations to preserve order and stability.<sup>36</sup> The executive has frequently claimed such power in military situations,<sup>37</sup> but such claims have also arisen in more mundane circumstances.<sup>38</sup> The point to see for our purposes is that if this authority exists,<sup>39</sup> it is contingent on the President first making factual findings—i.e., that a relevant emergency exists and the conduct in question is necessary to address it. Relatedly, some believe the President has the power to suspend habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it,”<sup>40</sup> another authority that requires factfinding—i.e., that there is a “Rebellion or Invasion” and that suspending the writ would be “require[d]” by “the public Safety.”

Factfinding is also a key part of constitutional authorities outside of the foreign affairs and national security space. Presidents have claimed a right to withhold documents from Congress and the public based on “executive privilege,” a claim that also requires factfinding.<sup>41</sup> The President’s appointment power also might require

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36. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 691 (1952) (Vinson, J., dissenting) (“[T]he Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress . . .”); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 808, 856 (2013) (arguing that a “presidential prerogative” authorizes the President to act “on the grounds of compelling public necessity”).

37. See, e.g., Chesney, *supra* note 10, at 1380–82 (listing executive claims of military exigency).

38. See, e.g., Auth. to Use Troops to Prevent Interference with Fed. Emps. by Mayday Demonstrations and Consequent Impairment of Gov’t Functions, 1 Supp. Op. O.L.C. 343, 344 (1971) (concluding impending “Mayday” protests could justify use of troops, if necessary, to carry out the “President’s constitutional duty to protect th[e] functioning [of the government] and prevent its obstruction”); see also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11, 74 (1993) (noting “the existence of a valid presidential power to protect the personnel, property, and instrumentalities of the United States,” including outside of emergency contexts).

39. Whether such power exists is highly contested. Compare *Youngstown*, 343 U.S. at 646–51 (Jackson, J., concurring) (rejecting argument that President has “inherent” power to “deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law”), with Delahunty & Yoo, *supra* note 36, at 808, 856 (arguing that “presidential prerogative” authorizes the President to act “on the grounds of compelling public necessity” even when not explicitly authorized by statute and perhaps even in violation of statutory law).

40. U.S. CONST. art. I, § 9. The standard view is that only Congress possesses this authority, but the executive branch has previously suggested the President possesses it. *E.g.*, *Removal of Japanese Aliens and Citizens from Haw. to the U.S.*, 1 Supp. Op. O.L.C. 84 (1942); *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74 (1861).

41. See, e.g., *Assertion of Exec. Privilege in Response to Cong. Demands for Law Enf’t Files*, 6 Op. O.L.C. 31 (1982); Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 251 (“[E]xecutive privilege . . . permit[s] the President to withhold information whose

factfinding if the President is obligated to ensure that the person she appoints is suitable and qualified for the position.<sup>42</sup> The President's authority to remove lands from public sale when she deems such removals in the "public interest"<sup>43</sup> also requires initial factfinding, as does the President's duty to recommend to Congress "such Measures as he shall judge necessary and expedient,"<sup>44</sup> and to convene a special session of Congress if he determines there is an "extraordinary Occasion[ ]."<sup>45</sup>

This list of constitutional factfinding powers is not meant to be exhaustive.<sup>46</sup> The purpose, instead, is to show that such powers are commonplace, spanning areas related to foreign affairs, military, domestic emergency, executive privilege, and legislative recommendations, among others.

### B. Statutory Law

Presidential factfinding is remarkably pervasive in statutory law, spanning a wide range of substantive areas. To start, it is a common feature of national security authorities. For example, shortly after 9/11, Congress passed the 2001 Authorization for Use of Military

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dissemination, in his considered view, would be sufficiently detrimental to the public interest . . .").

42. *See, e.g.*, Qualifications of Public Printer, 34 Op. Att'y Gen. 96, 97 (1924) (noting that the President "determine[s] whether the particular person appointed possessed the necessary skill to discharge the duties attaching to the position"); The Navy Efficiency Acts, 8 Op. Att'y Gen. 335, 351 (1857) ("These facts [relating to fitness or unfitness of person for particular appointment] it is the duty of the President, in all cases of nomination to office, to determine as he best may, by personal or by communicated knowledge.").

43. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("Emergencies may occur, or conditions may so change as to require that [the President] should, in the public interest, withhold the land from sale . . .").

44. U.S. CONST. art. II, § 3.

45. *Id.*; *see also* Presidential Auth. to Call a Special Session of Cong., 1 Supp. Op. O.L.C. 140, 141 (1947) ("The important factor would appear to be . . . that the Congress is not in session and that an extraordinary occasion has arisen which requires that it be in session . . . earlier than it otherwise would.").

46. *See also, e.g.*, Presidential Discretion to Delay Making Determinations Under the Chem. and Biological Weapons Control and Warfare Elimination Act of 1991, 19 Op. O.L.C. 306, 321–26 (1995) (noting "inherent authority to employ sources for gathering intelligence needed to protect the national security of the United States" which "will undoubtedly require careful assessments of the specific facts in each case"); Whether a Three-Day Recess by One Chamber of Cong. Constitutes an Adjournment for Purposes of the Pocket Veto Clause, 1 Supp. Op. O.L.C. 25, 25 (1934) (stating that the Pocket Veto can be used only if congressional adjournment " 'prevents' the President from returning the bill to the House in which it originated within the time allowed" (internal quotation marks omitted) (quoting Pocket Veto Case, 279 U.S. 655, 680 (1929))); Office & Duties of Att'y Gen., 6 Op. Att'y Gen. 326, 349–50 (1854) (suggesting pardon power requires investigation of facts underlying case).

Force (“2001 AUMF”), providing that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>47</sup> This authority is reliant on numerous factual determinations: the President must determine which “nations, organizations, or persons” “planned, authorized, committed, or aided” the terrorist attacks on 9/11, and what constitutes “necessary or appropriate force” against them.

It is worth spending a little time on this authority to highlight how common it is for interpreters to debate precisely which facts the President must find to exercise a particular authority. The 2001 AUMF undoubtedly authorizes the President to use force against al Qaeda and the Taliban, but debate has persisted since its passage regarding which other organizations, if any, the President can use force against.<sup>48</sup> It is now generally—although not universally—agreed that the 2001 AUMF authorizes use of force not solely against al Qaeda and the Taliban but also their “associated forces.”<sup>49</sup> To be an “associated force,” the executive branch has suggested the group must, among other things, be a “co-belligerent” of al Qaeda or the Taliban.<sup>50</sup> Rebecca Ingber has recently argued that there are, in fact, two variations of the “co-belligerency” test: the more permissive “support test,” which requires “the substantial provision of support” by a group to al Qaeda but not necessarily direct attacks on the United States, and the more restrictive “Active Hostilities Test,” which provides that only groups directly engaged in “active hostilities” against the United States would be included.<sup>51</sup> As Ingber points out, which test applies can make the difference between the President having the power to strike a terrorist group and not having such power.<sup>52</sup> As this discussion illustrates, the various debates regarding what test is appropriate all revolve around determining which factual predicates suffice to authorize force. Thus, the point to see here is that no matter the proper test for determining

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47. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

48. See, e.g., Ingber, *supra* note 8, at 70 (collecting sources on debate).

49. Cf., e.g., *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013) (“[T]he AUMF authorizes the President to detain enemy combatants . . . part of al Qaeda, the Taliban, or associated forces.”).

50. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 4 (Dec. 2016), [https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf) [<https://perma.cc/2BTZ-TWBV>] [hereinafter W.H. REPORT].

51. Ingber, *supra* note 8, at 72–73, 85–87.

52. *Id.* at 88, 96.

whether a terrorist group can be attacked under the 2001 AUMF, presidential factfinding is required.<sup>53</sup>

Presidential factfinding is present in numerous other military authorities. For example, under the War Powers Resolution, the President can extend the sixty-day limit on the use of military force permitted without a declaration of war if she “determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”<sup>54</sup> The President has authority to call out the militia if it is necessary “to suppress . . . any insurrection, domestic violence, unlawful combination, or conspiracy [that] . . . so hinders the execution of [state or federal] . . . laws” such that any class of people are deprived of a constitutional right and ordinary state authorities “are unable, fail, or refuse to protect that right.”<sup>55</sup> The President also possesses numerous powers over military personnel contingent on factfinding. For example, the President can change the rations for members of the Navy if she “determines that economy and health and comfort of the members . . . require such action”<sup>56</sup> and pay death benefits to dependents of members of the armed services if she “determines that the disability or death - - (1) was caused by hostile action; and (2) was a result of the relationship of the dependent to the member of the uniformed services.”<sup>57</sup> The President possesses numerous other military authorities contingent on finding facts, including the authority to increase the number of active-duty armed forces members; to arm water or aircraft; to override foreign ship-building prohibitions; to regulate servicemembers’ duties, pay, benefits, rations, and housing; and even to determine whether experimental drugs can be used on servicemembers.<sup>58</sup>

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53. See, e.g., W.H. REPORT, *supra* note 50, at 7 (“[T]he Executive Branch’s decision that a group is covered by the 2001 AUMF . . . follows careful consideration and fact-intensive reviews by senior government lawyers and is informed by departments and agencies with relevant expertise and institutional roles . . .”).

54. 50 U.S.C. § 1544(b) (2012).

55. 10 U.S.C.A. § 253 (West 2019).

56. 10 U.S.C.A. § 6082(a) (West 2019).

57. 10 U.S.C. § 1032(a) (2012).

58. See, e.g., 10 U.S.C. § 671b(a) (2012) (extend active duty periods “when the President determines that the national interest so requires”); 10 U.S.C.A. § 261(a)–(b) (West 2019) (arm water and aircraft if President “determines that the security of the United States is threatened by the application, or the imminent danger of application, of physical force by any foreign government or agency against the United States, its citizens, the property of its citizens, or their commercial interests”); 14 U.S.C. § 665(b) (2012) (prohibition on ship building in foreign shipyard can be suspended if “the President determines that it is in the national security interest of the United



The President possesses numerous factfinding authorities in the foreign affairs field as well. For example, the President can waive certain restrictions on transactions with Cuba if she determines that the Government of Cuba has, among other things, “held free and fair elections conducted under internationally recognized observers,” “permitted opposition parties ample time to organize and campaign for such elections, and has permitted full access to the media to all candidates in the elections.”<sup>59</sup> Dealings with Israel and the Palestinian Authority also frequently rely on presidential factfinding. For example, the President can only provide aid to the “ Hamas-controlled Palestinian Authority” if she certifies that it has, among other things, “committed itself and is adhering to all previous agreements” with the United States, Israel, and the international community, and made “demonstrable progress” toward “dismantling all terrorist infrastructure within its jurisdiction” and halting anti-Israel and anti-American incitement in its school materials.<sup>60</sup> Similarly, Congress has required the Palestine Liberation Organization to shut down its offices in the United States unless the President can certify that the Palestinians have not, among other things, taken any action “intended to influence a determination” by the International Criminal Court (“ICC”) to initiate an investigation against Israel.<sup>61</sup>

The President’s authorities and obligations related to sanctions are also often contingent on factfinding. For example, the President must impose sanctions if she determines that a foreign government has “used lethal chemical or biological weapons against its own nationals”<sup>62</sup>

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States to do so”); 10 U.S.C.A. § 125(b) (West 2019) (reassign duties if “necessary because of hostilities or an imminent threat of hostilities”); 10 U.S.C. § 12305(a) (2012) (suspend promotion, retirement, or separation for any member of armed forces “who the President determines is essential to the national security of the United States”); 10 U.S.C.A. § 6082(a) (West 2019) (alter Navy rations if the President “determines that economy and the health and comfort of the members of the naval service require such action”); 42 U.S.C. § 1503 (2012) (increase housing in “any localities where the President determines that there is an acute shortage of housing which impedes the national defense program and that the necessary housing would not otherwise be provided when needed for persons engaged in national defense activities”); 10 U.S.C. § 1107(f) (2012) (waive consent requirement for administering drugs to servicemembers only if the President determines “that obtaining consent is not in the interests of national security”).

59. 22 U.S.C. § 6007 (2012).

60. 22 U.S.C. § 2378b(a)–(b) (2012).

61. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 7041(l)(2)(B), 131 Stat. 135, 667; see also Josh Lederman, *U.S. Backtracks on Decision to Close Palestinian Office in DC*, ASSOCIATED PRESS (Nov. 24, 2017), <https://www.apnews.com/ed3d53ccff0e46e9951858f337e2c42a> [<https://perma.cc/Y958-MV5A>] (discussing an instance when the Trump administration limited the activities the Palestine Liberation Organization’s office in the United States could undertake because the administration would not make this certification following Palestinian President Mahmoud Abbas’s statements calling for the ICC to investigate and prosecute Israelis).

62. 22 U.S.C. § 5604(a) (2012).

or that “a foreign person . . . has knowingly and materially contributed” to the efforts of certain foreign countries to use or acquire chemical or biological weapons.<sup>63</sup> And the recent Russia sanctions bill provides that the President “shall” impose sanctions with respect to any person “the President determines . . . knowingly engages in significant activities undermining cybersecurity against any person . . . or government on behalf of [Russia].”<sup>64</sup> Presidential factfinding is also frequently present in other foreign affairs powers, including those related to entering into arms agreements, providing foreign aid or military assistance, and protecting foreign cultural objects from judicial power.<sup>65</sup>

Presidential factfinding is also frequently present in trade authorities. For example, the President’s authority to enter into major trade agreements, such as the Trans-Pacific Partnership, is contingent on making a determination “that one or more existing duties or other import restrictions of any foreign country . . . are unduly burdening and restricting the foreign trade of the United States” and that certain congressional objectives will be met by the deal.<sup>66</sup> In addition, if the President “find[s] as a fact that any foreign country places any burden or disadvantage upon the commerce of the United States by [certain] unequal impositions or discriminations” she can “declare such new or additional rate or rates of duty as [s]he shall determine will offset such burden or disadvantage.”<sup>67</sup> Other trade examples include that the President is authorized to give beneficial trade status to certain countries, to impose or terminate duties or import restrictions, and to raise trade quota levels, all predicated on finding certain facts.<sup>68</sup>

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63. 50 U.S.C. § 4613(a) (2012).

64. Countering America’s Adversaries Through Sanctions Act, 22 U.S.C.A. § 9524(a) (West 2019).

65. *See, e.g.*, 22 U.S.C. § 2767(j) (2012) (authorizing arms agreements with “any friendly foreign country not a member of the North Atlantic Treaty Organization” upon presidential finding that such an agreement “would be in the foreign policy or national security interests of the United States”); 7 U.S.C.A. § 1733(j) (West 2019) (limiting aid to countries engaging in a “consistent pattern of gross violations of internationally recognized human rights” as determined by the President); 22 U.S.C. § 2459(a) (2012) (removing judicial jurisdiction over cultural artifacts if the President determines that the object has “cultural significance” and its display in the United States is “in the national interest”).

66. 19 U.S.C.A. § 4202(a) (West 2019).

67. 19 U.S.C. § 1338(d) (2012).

68. *See, e.g.*, 19 U.S.C.A. § 3703 (West 2019) (describing beneficial status if the President determines, among other things, that a country “established . . . a market-based economy that protects private property rights”); 19 U.S.C. § 2462(b) (2012) (asserting a lack of beneficial trading status if, among other things, a country is communist, part of an arrangement to withhold certain commodities from international trade, or has nationalized American property); 7 U.S.C. § 624(b) (2012) (authorizing certain import duties if “the President finds the existence of [certain] facts”); 19 U.S.C. § 3601(b) (2012) (authorizing the President to change quota levels based on certain factual findings).

Factfinding is also present in the President's immigration powers. For example, as made famous by President Trump's so-called Travel Ban, the President can suspend the entry of certain classes of aliens if she deems their entry "detrimental to the interests of the United States."<sup>69</sup> The President also sets the number of refugees permitted to enter into the country by determining the number that is "justified by humanitarian concerns or is otherwise in the national interest."<sup>70</sup>

The President also has serious powers if she finds there is an emergency or disaster, a determination that requires finding facts. For example, under the International Emergency Economic Powers Act ("IEEPA"), the President can regulate or prohibit any foreign exchange transactions and the import or export of currencies or securities, and nullify property holdings in the United States upon declaring a "national emergency" relating to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."<sup>71</sup> The President can also trigger significant domestic powers if she declares certain types of disasters or critical shortages of supplies or energy, all of which "depend[] on the particular facts presented" by the situation.<sup>72</sup> Even absent an "emergency," the President has possessed serious domestic economic power to stabilize "prices, rents, wages, and salaries," predicated on making a determination that, for example, "prices or wages in [a relevant] industry or segment of the economy have increased at a rate which is

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69. 8 U.S.C.A. § 1182(f) (West 2019).

70. 8 U.S.C. § 1157(a)(2) (2012).

71. 50 U.S.C. §§ 1701–1702 (2012).

72. Legal Auths. Available to the President to Respond to a Severe Energy Supply Interruption, 6 Op. O.L.C. 644, 650 (1982) ("[I]t is impossible to determine in the absence of specific facts when exercise of [the relevant] authority would be consistent with the terms of the statute."); *see, e.g.*, 15 U.S.C. § 713d-1(a) (2012) (discussing presidential findings regarding when a critical energy supply shortage has taken place); 42 U.S.C.A. § 5122 (West 2019) ("emergency" powers triggered upon presidential determination that federal assistance is necessary to "save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States"); *id.* ("major disaster" powers triggered upon presidential determination that a "natural catastrophe . . . causes damage of sufficient severity and magnitude to warrant" supplemental assistance to state and local governments); 42 U.S.C.A. § 6202(8) (West 2019) ("severe energy supply interruption" powers triggered upon presidential determination that "a national energy supply shortage" is, or is likely to result from, "an interruption in the supply of imported petroleum products," "an interruption in the supply of domestic petroleum products," or "sabotage, an act of terrorism, or an act of God"; is likely to be "of significant scope and duration, and of an emergency nature"; and is likely to "cause major adverse impact on national safety or the national economy").

grossly disproportionate to the rate at which prices or wages have increased in the economy generally.”<sup>73</sup>

Apart from these foreign affairs and emergency authorities, factfinding is also present in one of the most discussed aspects of presidential power: for-cause removal. All for-cause removal statutes require the President to find facts to exercise them—i.e., that there was “cause,” such as “inefficiency, neglect of duty, or malfeasance in office.”<sup>74</sup>

Factfinding is also a part of more mundane but consequential domestic powers. For example, the President’s power to create national monuments is contingent on finding facts—i.e., that “landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . are situated on land owned or controlled by the Federal Government” and that the reserved parcels of land are “confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>75</sup> The President can also issue regulations relating to procurement contracts, which affect a large part of the economy, only if she determines that such regulations will “promote economy and efficiency in government procurement.”<sup>76</sup>

Apart from these more high-profile authorities, some factfinding authorities are quite obscure. For example, the President possessed authority to extend a deadline for when private bus services had to be accessible to individuals with disabilities, but only if she “determin[ed]” that compliance with previously issued deadlines would “result in a significant reduction in intercity over-the-road bus service.”<sup>77</sup> Factfinding is present in far more areas of presidential power. It is a

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73. See, e.g., Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 202(a)–(b), 84 Stat. 796, 799–800; *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 752–53 (D.D.C. 1971) (upholding delegation of authority).

74. 12 U.S.C. § 5491(c)(3) (2012); see also Datla & Revesz, *supra* note 5, at 786 (collecting sources listing such for-cause removal authorities). Indeed, despite significant commentary on the constitutionality of for-cause removal and what precisely is sufficient to constitute “cause,” there has been little discussion of how the President goes about finding whether such “cause” is present. See Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 746 n.328 (2018) (discussing debate over what constitutes “cause”); see also *id.* at 745 (suggesting a notice and hearing requirement for for-cause removal of officers).

75. 54 U.S.C.A. § 320301(a)–(b) (West 2019); see also Bruff, *supra* note 10, at 36–38 (noting a number of factual issues underlying national monument designations).

76. Auth. to Issue Exec. Order on Gov’t Procurement, 19 Op. O.L.C. 90, 90 (1995) (President can promulgate regulations governing procurement contracts if determines regulations “will promote economy and efficiency in government procurement”); see 40 U.S.C. §§ 101, 121(a) (2012); Bruff, *supra* note 10, at 42 (noting factual issues underlying use of authority).

77. 42 U.S.C. § 12185(d) (2012); see also 12 U.S.C. § 1706c(a) (2012) (providing that the Secretary of Housing and Urban Development can increase mortgage insurance if the President determines the increase to be in the “public interest,” after “taking into account the general effect of any such increase upon conditions in the building industry and upon the national economy”).

feature of presidential authorities regulating the environment, public health, public lands, government organization, government pay, the census, housing, criminal law, budget- and debt-ceiling authorities, and even the Congressional Review Act.<sup>78</sup>

While a comprehensive account of all statutory authorities requiring the President to find facts would require an entire article of its own, the point for now is simply to show how common presidential factfinding is. Presidential factfinding spans virtually every substantive area of presidential authority, from military and foreign affairs to housing insurance.<sup>79</sup> It is a truly pervasive feature of the President's statutory power.

### C. International Law

There are also numerous powers under international law that are contingent on presidential factfinding.<sup>80</sup> For example, under international law, a state can use force in violation of another state's sovereignty when it is in "self-defense," which is understood to include protection against "imminent" attacks.<sup>81</sup> "Imminence" is determined by considering, among other things, "the nature and immediacy of the threat; the probability of an attack; . . . [and] the likely scale of the attack and the injury, loss, or damage likely to result therefrom."<sup>82</sup>

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78. As merely representative examples, see 33 U.S.C.A. § 1321 (West 2019) (discharge of hazardous substances); 43 U.S.C. § 1333 (2012) (Continental Shelf boundaries); 43 U.S.C. § 2007 (2012) (oil transport system); 5 U.S.C. § 903(a) (2012) (government reorganization); 5 U.S.C. § 5570(b) (2012) (government benefits); Continuing Appropriations, 1981, Pub. L. No. 96-369, § 118, 94 Stat. 1351, 1357 (1980) (special census); 31 U.S.C. § 3101A(a)(1)(A) (2012) (debt-ceiling increase); 5 U.S.C. § 801(c)(2) (2012) (Congressional Review Act).

79. Indeed, statutory presidential factfinding is hardly new. To the contrary, such authorities date back to the Founding era. See, e.g., JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 64–85 (1927) (discussing history of legislation contingent on factfinding); see also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 683 (1892) (noting that "frequently, from the organization of the government to the present time," Congress passed statutes that "depend upon the action of the president based upon . . . the ascertainment by him of certain facts"); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421–22 & n.9 (1935) (listing such authorities).

80. To be clear, international law does not require the *President*, per se, to find these facts—it requires the state to do so. But the examples that follow are powers that the President exercises as a matter of domestic law, and the obligations therefore attach to her.

81. U.N. Charter art. 51; W.H. REPORT, *supra* note 50, at 9:

The U.N. Charter recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack . . . . Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to *imminent* attacks before they occur.

82. W.H. REPORT, *supra* note 50, at 9 (quoting Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 775 (2012)).

Apart from “imminence,” the executive branch has also argued that force can be used in violation of another state’s sovereignty if that state is “unwilling or unable” to take care of the particular threat, which “can be demonstrated most plainly where . . . a State has lost or abandoned effective control over the portion of its territory where the armed group is operating” or where the state “is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.”<sup>83</sup> The scope of these authorities is the subject of heated debate. But whatever their proper scope, relying on these authorities requires the President to find certain facts. Apart from these *jus ad bellum* questions, there are a number of *jus in bello* questions, relating to targeting decisions, detention, and the like, which also require factfinding.<sup>84</sup>

These are hardly the only international law authorities that require factfinding. The point here is simply to provide a brief survey to show that presidential factfinding authorities are not limited to domestic law. That said, going forward in discussing the President’s legal obligations in conducting factfinding, I will bracket international law authorities because they present distinct issues and challenges.<sup>85</sup>

#### *D. A Taxonomy of Presidential Factfinding*

Above I have sought to provide a survey of presidential factfinding powers spanning constitutional, statutory, and international law. Before moving on to describing the positive and normatively desirable obligations on presidential factfinding, it is helpful to explain how factfinding powers fit into the broader realm of presidential power. Presidential powers might be divided into three broad types: (1) Pure Fact, (2) Mixed Fact and Policy, and (3) Pure Discretion powers, with the positive and normative analysis discussed below attaching to Pure Fact and Mixed Fact and Policy powers but *not*

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83. *Id.* at 10; see also Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483, 486 (2012) (“[I]t is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.”).

84. For example, international law limits requiring states to abide by the principles of distinction, proportionality, necessity, and humanity when using force all require intensive factfinding. See, e.g., W.H. REPORT, *supra* note 50, at 20–21. Military detention also requires factfinding. For example, the executive branch has stated that it can detain persons if they “were part of, or substantially supported, Taliban or al-Qa’ida forces or associated forces,” *id.* at 29, a determination that requires resolving complex factual questions. See Waxman, *supra* note 10, at 1380–82 (discussing factfinding questions raised by varying definitions of who can be detained).

85. The extent to which the President is obligated to comply with international law qua international law is a highly contested issue that I bracket for purposes of this Article.

to Pure Discretion powers. Of course, this taxonomy is not perfect. The types described below are not hermetically sealed but rather operate on a spectrum. While there will surely be difficult borderline cases, the hope is that identifying these core types will help clarify the analysis that follows.<sup>86</sup>

### 1. Pure Fact Powers

“Pure Fact” powers require the President to make a “purely factual” determination in order to exercise an authority or duty. By a “purely factual” determination, I mean an “assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.”<sup>87</sup> Pure Fact powers empower (or mandate) the President to act upon making such a finding.

Examples of such powers include the President’s duty to sanction individuals who have “knowingly and materially contributed . . . through the export . . . of [certain] goods or technology” to certain countries’ chemical weapons development;<sup>88</sup> the authority to use force against “nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”;<sup>89</sup> the authority to waive certain trade restrictions if countries have revoked certain laws, opened ports to American vessels, or imposed certain duties;<sup>90</sup> and the authority to lift bars on importing cattle when it can be done “without danger of the introduction or spread of contagious or infectious disease.”<sup>91</sup> Pure Fact determinations might be retrospective or predictive in nature,<sup>92</sup> they

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86. See, e.g., Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 498 (2000) (“All distinctions potentially have borderline cases . . . [A]lthough lawyers, particularly, are likely to be preoccupied with dusk when people ask them about the distinction between night and day, we do not believe that the existence of borderline cases undercuts the existence of a workable distinction . . .”).

87. JAFFE, *supra* note 28, at 548.

88. See 50 U.S.C. § 4613(a)(1) (2012).

89. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

90. COMER, *supra* note 79, at 66.

91. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 688 (1892) (quoting Act of Mar. 6, 1866, 14 Stat. 3, 4).

92. See, e.g., Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 919 n.10 (1992) (noting that findings of fact can include “what will happen,” “what would have happened in the past given a particular set of conditions,” and “what would happen in the future given a particular set of conditions”); see also JAFFE, *supra* note 28, at 548–49 (“There is . . . no difference in kind between an inference as to the past and an inference as to the future, though psychologically we may feel that an inference as to the past is ‘true,’ an inference as to the future only ‘probable.’”).

might relate to particular parties or be about more general phenomena in the world,<sup>93</sup> and they might be more or less verifiable.<sup>94</sup>

Regardless of how one wishes to divide up such Pure Fact determinations, the core of these findings is that they are meant to be descriptions or predictions of the state of the world, *independent of the application of broad policy judgment*. To be sure, some of these facts require the exercise of “judgment” in some sense—after all, we cannot know if someone “knowingly” gave certain weapons to a foreign state but can only infer that state of mind from evidence.<sup>95</sup> But the point is that, unlike powers in the Mixed Fact and Policy category, there is no subsequent policy determination that must be made after the facts are found to permit or require the power to be exercised. The finding triggering the power is a claim that an empirical phenomenon has or will occur.

## 2. Mixed Fact and Policy Powers

Some powers require determinations that mix factual and policy judgment. For these authorities, the President must, first, find certain facts and, then, make a judgment about whether *based on those facts* the exercise of power meets the judgmental policy criteria the Constitution or Congress has set forth. What is important to see for our

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93. For facts relating to specific parties, see, for example, 12 U.S.C. § 5491(c)(3) (2012) (suspension of assistance to certain countries if “any member who was elected to that country’s parliament has been removed from that office or arrested through extraconstitutional processes”); 22 U.S.C. § 2797a(a) (2012) (authorizing sanctions on U.S. persons upon finding they “knowingly” exported certain missile technologies). For facts relating to more general phenomena, see, for example, 19 U.S.C. § 2462(b) (2012) (asserting a lack of status if country is, among other things, “controlled by international communism” or engaged in “an arrangement of countries . . . to withhold supplies of vital commodity resources from international trade”); 19 U.S.C.A. § 3703 (West 2019) (describing beneficial status if country established a “market-based economy that protects private property rights”). This distinction draws on K.C. Davis’s famous dichotomy of “adjudicative” and “legislative” facts, see, e.g., 2 DAVIS, *supra* note 12, § 12:3, at 412, but because the President does not engage in trial-like, formal adjudication even for what Davis would call “adjudicative” (who, what, where, when) facts, I find the terminology more distracting than illuminating in this context.

94. As examples of varying levels of verifiability, see 22 U.S.C. § 2378b (2012), which states that the President can authorize aid only if she certifies that the Hamas-controlled Palestinian Authority “publicly acknowledged the Jewish state of Israel’s right to exist”; made “demonstrable progress” toward “destroying unauthorized arms factories, thwarting and preempting terrorist attacks, and fully cooperating with Israel’s security services”; and is “ensuring democracy, the rule of law, and an independent judiciary.”

95. See JAFFE, *supra* note 28, at 548–49, 551–52 (“A finding of fact does not require — because it cannot require — that the phenomenon so found have been or be an absolute reality. The finding is neither more nor less than an inference based on evidence.”).



purposes is that, even if the ultimate determination is one of “policy judgment,” it is reliant on factual investigation.<sup>96</sup>

Numerous powers arguably fall into this category. For example, the President’s ostensible constitutional authority to use unilateral military force if it is in furtherance of certain important “national interests,”<sup>97</sup> to settle American claims if they are a “necessary incident to the resolution of a major foreign policy dispute between our country and another,”<sup>98</sup> to call forth a militia if it is “necessary to suppress” an insurrection,<sup>99</sup> or to enter into certain trade agreements if current duties are “*unduly* burdening and restricting the foreign trade of the United States.”<sup>100</sup> Common statutory requirements that the President find that certain conduct is in the “national interest,”<sup>101</sup> “paramount interest of the United States,”<sup>102</sup> “national security interest,”<sup>103</sup> or

96. OLC, itself, has provided support for the notion that such determinations are contingent on underlying facts. *See, e.g.*, Legal Auths. Available to the President to Respond to a Severe Energy Supply Interruption, 6 Op. O.L.C. 644, 650 (1982):

[T]o the extent that the President’s authority under certain statutes rests on a discretionary presidential finding, for example, that an emergency situation exists or that actions are necessary and appropriate “in the national interest,” to promote the “national defense,” or to fulfill international obligations of the United States, *it is impossible to determine in the absence of specific facts* when exercise of that authority would be consistent with the terms of the statute.

(emphasis added). And in *Field v. Clark*, the Court made clear that the ultimate “judgment” that certain tariffs unreasonably affected American commerce had to be predicated on empirical investigation. *See* 143 U.S. at 693:

The words “he may deem,” in the third section, of course implied that *the president would examine the commercial regulations of other countries* producing and exporting [certain goods], and form a judgment as to whether they were reciprocally equal and reasonable . . . in their effect upon American products.

(emphasis added) (quoting Tariff Act of 1890, § 3, 26 Stat. 567, 612).

97. *See* BRADLEY & GOLDSMITH, *supra* note 7, at 664 (discussing “national interest” test for uses of force); Auth. to Use Military Force in Libya, *supra* note 1, at \*10 (2011) (stating that the President has legal authority to use military force if, inter alia, doing so would “serve sufficiently important national interests”).

98. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

99. 10 U.S.C.A. § 253 (West 2019).

100. 19 U.S.C.A. § 4202 (West 2019) (emphasis added).

101. *E.g.*, 7 U.S.C. § 1728a(a) (2012) (permitting the delivery of foreign aid if in the “national interest”); 10 U.S.C.A. § 152 (West 2019) (waiving restrictions on appointing officers if “necessary in the national interest”); 30 U.S.C.A. § 1412(c)(5) (West 2019) (limiting hard mineral resources processing unless “such restrictions contravene the overriding national interests of the United States”).

102. *See, e.g.*, 42 U.S.C. §§ 4903(b)(2), 6991f(a), 6961(a) (2012) (providing for exemptions to federal law if the President determines something is in the “paramount interest of the United States”).

103. *See, e.g.*, 10 U.S.C. § 12305(a) (2012) (empowering the President to suspend “any provision of law relating to promotion, retirement, or separation for any member of armed forces who the President determines is essential to the national security of the United States”); 22 U.S.C.A. § 9524(c) (West 2019) (stating that the President can waive Russian sanctions if “in the vital

“national defense” interest<sup>104</sup> likely fall into this category as well. What is important to see is that, although the ultimate determination might require policy judgment, the judgment is based on a set of facts.<sup>105</sup>

For example, to determine if certain tariffs are “unduly burdening and restricting the foreign trade of the United States,”<sup>106</sup> the President must first determine the empirical effect of the tariffs. These are questions of Pure Fact—i.e., are the tariffs restricting the foreign trade of the United States, and, if so, by how much? After investigating these empirical questions, the President can then apply policy judgment—i.e., is that restriction of trade “undu[e]”?<sup>107</sup> Similarly, to impose certain conditions on procurement contracts, the President must find that the conditions will “promote economy and efficiency in government procurement,” a determination that must be predicated on an empirical assessment of the consequences of imposing the conditions.<sup>108</sup>

There are thus two key steps in exercising power in the Mixed Fact and Policy category: in one step, empirical investigation is required and, in the other, policy judgment is applied to the results of that investigation. Although both steps are required, their order might vary or iterate. Sometimes, the first step will be to conduct empirical investigation, and the second will entail using policy judgment to assess whether, in light of that empirical investigation, the use of the power is desirable or mandated. In other contexts, the first step might be to use policy judgment to determine which facts are relevant, followed by empirical investigation, followed by policy judgment applied to the results of the investigation. Of course, the President might not always consciously separate these steps out cleanly, and, in some circumstances, it might be very difficult to do so.<sup>109</sup> But, in the main,

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national security interests”); Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 7, 109 Stat. 398, 400 (empowering the President to suspend requirements related to moving U.S. Embassy to Jerusalem if doing so “is necessary to protect the national security interests of the United States”).

104. See, e.g., 50 U.S.C.A. § 98f(a) (West 2019) (authorizing release of materials from stockpile if “required for . . . the national defense”); 50 U.S.C.A. § 4533 (West 2019) (granting authority to contract for certain industrial resources if material is “essential to the national defense”).

105. This point is consistent with Louis Jaffe’s “analytical approach” to teasing apart findings of fact from questions of law. See JAFFE, *supra* note 28, at 548. But see 4 DAVIS, *supra* note 12, § 29:14, at 391–94 (2d ed. 1983) (calling for a “practical approach” to determine appropriate judicial review through institutional competence assessment of whether a court or agency would better make a finding).

106. 19 U.S.C.A. § 4202 (West 2019).

107. *Id.*

108. See Auth. to Issue Exec. Order on Gov’t Procurement, *supra* note 76, at 90; Bruff, *supra* note 10, at 42 (noting factual issues underlying finding).

109. See, e.g., 1 DAVIS, *supra* note 12, § 6:13, at 510 (observing that separating factual components from policy judgments, while often easy, sometimes presents difficulty); THOMAS L.

the two steps can be separated out conceptually and are thus worth teasing apart.<sup>110</sup> For purposes of this Article, the point is to clarify that the positive and normative analysis discussed in Parts II and III below apply to the factfinding stage of these powers, even if they do not apply to the policy judgment stage.<sup>111</sup>

I do not wish to make too much of the distinction between “fact” and “policy judgment.” Perhaps the line blurs at the margins. But I think the basic distinction is intuitive and helps address a concern some may have about categorizing certain arguably vague determinations (like what is “reasonable” or “necessary” or in the “national interest”) as facts. My contention is that, even if we conceive of these authorities as “mixed” questions of fact and policy, they are decidedly *mixed*, in that they require a basis in factfinding, even if there is a step in the analysis that allows for an exercise of “policy judgment.”

And to be sure, the line between Mixed Fact and Policy and Pure Fact powers will not always be easy to draw. For example, the statute at issue in *Field v. Clark* provided that certain free-trade provisions would be suspended if the President determined that a country’s duties were “reciprocally unequal and unreasonable.”<sup>112</sup> The Supreme Court described this as a finding of “fact,”<sup>113</sup> but others have claimed it was more of an exercise in policy judgment.<sup>114</sup> The point for our purposes is that, even if it was a determination of “policy judgment,” it was necessarily predicated on particular underlying facts.

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HUGHES, *THE FATE OF FACTS IN A WORLD OF MEN* 6, 23 (1976) (describing a “two-way search: of intelligence in search of some policy to influence, and of policy in search of some intelligence for support”).

110. Cf. Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 *IND. L.J.* 1, 8–9 (2009) (“Although the line between legislatures’ empirical fact-finding and policy judgments is not always crisply drawn, it is important to consider each of these legislative functions distinctly.”). Indeed, there might be good normative reason to do so. See Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 *B.C. L. REV.* 433, 467 (2013) (arguing for “articulated government through successive phases of governance each of which maintains its own integrity” (emphasis omitted)).

111. I leave for another day whether comparable obligations attach to the policy judgment. Cf. Borgmann, *supra* note 110, at 9 (“Whether to defer to a legislature’s policy choices raises very different questions about legitimacy and competency than whether to defer to a legislature’s empirical fact-finding.”).

112. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892).

113. *Id.* at 693 (“As the suspension was absolutely required when the president ascertained the existence of a *particular fact*, it cannot be said that in ascertaining *that fact*, . . . in obedience to the legislative will, he exercised the function of making laws.” (emphasis added)); see also *Dep’t of Transp. v. Assoc. Am. R.R.*, 135 S. Ct. 1225, 1248 (2015) (Thomas, J., concurring) (“[T]he Court appeared to understand the statute as calling for . . . a *factual* determination.”).

114. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 *VA. L. REV.* 327, 364–65 (2002).

## 3. Pure Discretion Powers

The third category of powers are “Pure Discretion” powers. These powers give the President the authority to act without first having to make any particular factual determinations. For example, conventional wisdom assumes that the President can remove agency heads without for-cause removal protection for any reason or no reason at all.<sup>115</sup> On this view, removal authority is a Pure Discretion authority—the President does not need to find any facts to exercise it. Similarly, conventional wisdom assumes that the President can veto legislation for any reason or no reason at all—she need not find any facts to do so.<sup>116</sup> For these Pure Discretion powers, no facts need be found, and the obligations described below would not attach.<sup>117</sup>

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The point of this taxonomy is to clarify the scope of the phenomenon and help identify when the positive and normatively desirable obligations discussed in Parts II and III below apply. My contention is that presidential factfinding—as I refer to it in this Article—occurs *whenever the President is required to find facts to exercise power*. In this taxonomy, this occurs in Pure Fact and Mixed Fact and Policy powers, but not in Pure Discretion powers. For Mixed Fact and Policy powers, the positive and normative analysis discussed below will apply, at least, to the stage of empirical investigation that forms the predicate of the ultimate policy determination.

As with any taxonomy, the categories I provide could certainly be disputed.<sup>118</sup> Some powers will be difficult to categorize, and others will combine features of the different types of powers. Moreover, there will often be debate about which substantive facts are required to

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115. Heidi Kitrosser, *Presidential Administration: How Implementing Unitary Executive Theory Can Undermine Accountability*, 40 ADMIN. & REG. L. NEWS 4, 4 (2015) (“Unitary executive theorists argue that . . . the president at minimum has unfettered removal power over all federal government actors who exercise discretionary executive authority.”).

116. J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 92 n.10 (2005) (“Commentators have uniformly posited that, as a descriptive matter, the veto power is wholly discretionary.”).

117. It is not obvious to me that any such Pure Discretion powers actually exist. The notion that the President could use her authority without considering the effects of that use of authority on the world seems inconsistent with a view that the President is bound to faithfully execute the law. However, to the extent such authorities do exist—as some commentators seem to assume—the obligations I discuss below would not necessarily attach to such authorities.

118. *Cf.*, e.g., Araiza, *supra* note 28, at 898 (“No typology can comprehensively catalog something as broad as the universe of fact types.”).

trigger Pure Fact or Mixed Fact and Policy powers.<sup>119</sup> But *whatever facts authorize the President to act*, we must know more about how the President goes about finding them. The next Part turns to identifying what positive obligations attach to presidential factfinding.

## II. THE POSITIVE OBLIGATIONS ON PRESIDENTIAL FACTFINDING

What, precisely, are the President's obligations in finding facts? In this Part, I argue that the President has a constitutional duty to be honest and engage in reasonable inquiry in finding facts. I ground this argument in conventional sources of constitutional interpretation, including the text of the Constitution, its structural features, Supreme Court precedent, and past branch practice.<sup>120</sup> Before getting into the analysis, two points of clarification are in order. First, although I give a fairly detailed explanation of why a constitutional duty to be honest and engage in reasonable inquiry exists, I think it is fairly intuitive. Put at a level of abstraction, few would suggest that if the President must find facts to exercise power she can do so dishonestly and arbitrarily. That said, given that this question has yet to be addressed in the scholarship or case law, it is worth providing a more comprehensive account of the bases for this duty.<sup>121</sup>

Second, the focus of this Part is on the President's baseline legal obligations, regardless of whether particular individual rights are implicated. Of course, if the President's actions infringe on individual rights, *those rights* might raise their own legal requirements in how the President exercises authority. For example, in certain contexts, due process might require certain procedures—including perhaps judicial review—before (or after) certain facts are found.<sup>122</sup> However, these

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119. See, e.g., *supra* notes 31, 48–53 and accompanying text.

120. Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 1–119 (1982) (discussing conventional sources of constitutional interpretation); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987) (same); Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1874 (2015) (relying on “conventional sources of constitutional interpretation, including constitutional text, historical practice, precedent, and normative and pragmatic analysis”).

121. I hasten to add that while I think the treatment below is more rigorous than any account I have seen, it could surely be even more rigorous. Although each modality of constitutional interpretation discussed below could be further elaborated, I believe this Part provides sufficient grounding for the duty I identify to be accepted.

122. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915) (stating that no hearing is required for a finding of general facts affecting large classes of people, but a hearing is required where a “relatively small number of persons [are] concerned, who [are] exceptionally affected”); see also *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (“[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”); Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L.

obligations are distinct from what Article II, on its own, requires when due process or other limits are silent—as they very often will be in the context of presidential factfinding. This Part thus seeks to focus on identifying the President’s baseline obligations in how she finds facts, even if no individual rights are implicated and even if judicial review is not available.

And, in case it is not obvious, determining first-order legal obligations on the executive branch is important even where compliance with these obligations will not be judicially reviewed.<sup>123</sup> This is true for, at least, three reasons: First, identifying these first-order obligations enables public accountability,<sup>124</sup> better congressional oversight and regulation,<sup>125</sup> and, perhaps, the expansion of existing judicial review.<sup>126</sup>

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REV. 193, 198–99 (1956) (“[A] party who has a sufficient interest or right at stake in a determination of government action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in [exceptional circumstances].”). Article III might also impose certain requirements. *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299 (1990) (“[E]ven when a [non-Article III] federal tribunal provides due process, article III may require the availability of at least some judicial review in an article III tribunal.”); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (examining Congress’s ability to empower non-Article III officials to make factual findings that are binding on courts or private parties’ legal disputes). Because determining what obligations due process or Article III limits might impose would require fuller treatment than can be given here, I leave those questions for another day.

123. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383 (2001):

For too long, administrative law scholars focused on judicial review and other aspects of legal doctrine as if they were the principal determinants of both administrative process and administrative substance. They are not, and the most welcome change in administrative law scholarship over the past decade or so has been its insistence on this point. As this new body of scholarship has shown, much of what is important in administration occurs outside the courthouse doors.

(footnote omitted); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 244 (1976) (“It is not mere theory to distinguish between constitutional law and judicial review.”); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring):

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. . . . Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

124. *See, e.g.*, Bradley & Morrison, *supra* note 17, at 1127 (noting that even outside “formal enforcement” of law on the President, “there may still be enforcement through informal mechanisms such as congressional backlash and public disapproval”).

125. *See, e.g.*, Stack, *Statutory*, *supra* note 17, at 568 (“[W]ithout a general framework, Congress has no baseline around which to legislate and specifically to indicate when it seeks to grant broad deference to the president and when it does not.”).

126. *See, e.g.*, Bradley & Morrison, *supra* note 17, at 1131 (“[T]he likelihood of judicial review is probably affected by the extent to which courts perceive the President to be stretching traditional legal understandings.”).

Second, there are numerous systems in place whereby executive branch lawyers must sign off on conduct as legally permitted before it can take effect.<sup>127</sup> Thus, if these obligations are identified and accepted internally, this can have a tremendous impact on executive branch governance.<sup>128</sup> Finally, understanding the President's legal obligations can be relevant to determining whether impeachment is an available recourse when the President fails to abide by them.<sup>129</sup> Indeed, even if judicial review *were* the exclusive focus, understanding the President's first-order obligations is important. It is hard to come up with a coherent method of judicial review without understanding what the President's legal obligations are in the first place.<sup>130</sup>

In short, this inquiry matters for first-order questions of whether the President is obeying the law, as well as toward second-order inquiries of how courts should review presidential factfinding, which are relevant to current, high-profile litigation on the matter.<sup>131</sup> With these clarifications out of the way, the explanation of the President's existing duties in how she finds facts can begin.

### A. Text

The Take Care Clause provides strong textual support for the notion that the President must be honest and engage in reasonable inquiry in finding facts. Article II, Section 3 states that the President “shall take Care that the Laws be faithfully executed.”<sup>132</sup> Although the

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127. *See, e.g., id.* at 1132–34 (observing that “[t]he executive branch contains thousands of lawyers’ who typically internalize legal norms as a constraint); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 80–81 (2017) (“Lawyers operate throughout the national administrative state . . . . Few agency policies and sanctioned actions go unvetted by lawyers, and agency lawyers often wield substantial power . . . over agency policy.”); *id.* at 78 (“[I]nternal oversight and supervision reach a far broader array of agency action than courts can, and are able to prevent unlawful agency actions from occurring in the first place.”).

128. *See, e.g.,* Bradley & Morrison, *supra* note 17, at 1101, 1132–37 (“To the extent that a particular question of presidential power is recognized as a legal question, it is virtually inevitable that lawyers somewhere within the executive branch will provide advice on the question.”).

129. If the President lies or arbitrarily finds facts for highly consequential exercises of authority, this could conceivably qualify as an “egregious abuse[ ] of official authority” subjecting the President to impeachment. *See* CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 128–29 (2017) (“[L]ying to Americans about the rationale for a war, and for putting human lives on the line, is impeachable.”).

130. Put another way, to understand the “decision rule” by which courts ought to review whether the President has complied with her legal obligations, we first must understand the “operative proposition” that the rule is meant to implement. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

131. *See supra* notes 21–25 (describing challenges to Trump administration policies reliant on presidential factfinding).

132. U.S. CONST. art. II, § 3.

clause is famously “delphic,”<sup>133</sup> its application here is relatively straightforward. While scholars have debated the extent to which the Take Care Clause grants the President *powers*,<sup>134</sup> no one debates that it imposes a *duty* on the President to “take Care” that the “Laws” be “faithfully executed.”<sup>135</sup> It is also generally accepted that the referenced “Laws” include both constitutional and statutory laws.<sup>136</sup> It follows, then, that when the Constitution or a statute requires the President to find certain facts as a predicate to exercising power, then such factfinding is part of the “execution” of the Law that must be done “faithfully.” Indeed, the Supreme Court has upheld presidential factfinding against a nondelegation challenge on the ground that the President was “the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect,” a duty the Court described as an “*execution* of the act of Congress.”<sup>137</sup> In short, it seems clear that factfinding done as a predicate to exercise power under statutory or constitutional law is “execution” of the law, requiring it to be done “faithfully.”

But what does executing the Laws “*faithfully*” entail? The most prominent Founding-era dictionary defined “faithfully” as “strict adherence to duty and allegiance”; “[w]ithout failure of performance; honesty; exactly”; and “[h]onestly; without fraud, trick, or ambiguity.”<sup>138</sup> Noah Webster’s 1828 dictionary similarly defined “faithfully” as with “strict observance of promises, vows, covenants or

133. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016).

134. The Take Care Clause has been interpreted to provide the President with the power to remove officers, control prosecutorial discretion, and take action necessary to protect the operations of the federal government. *See id.* at 1837–38.

135. *See id.* at 1867; *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 62 (1994) (“[T]he Take Care Clause is expressed as a duty rather than a power.”); Metzger, *supra* note 120, at 1876–77 (“Th[e] clause[s] obligatory character is often obscured by the more prominent and ongoing debate over the scope of presidential power.”).

136. *See, e.g.*, Metzger, *supra* note 120, at 1878 (highlighting general agreement that the Take Care Clause embodies the meaning that the President “must obey constitutional laws and lacks a general prerogative or suspension power”). *But see* Delahunty & Yoo, *supra* note 36, at 800–01 (acknowledging that “Laws” includes a duty to obey the Constitution, but arguing that the term does not include “statutory law or treaty provisions that [the President] reasonably and in good faith considers to be unconstitutional”); Goldsmith & Manning, *supra* note 133, at 1856 (noting the argument that “Laws” does not include constitutional law); Andrew Kent, Ethan J. Leib & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming 2019) (manuscript at 24–25) (stating that “[w]e have not reached a confident answer to the question whether” Laws included only statutes, or also “perhaps the Constitution, treaties, common law, or the law of nations”).

137. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 410–11 (1928) (emphasis added).

138. *Faithfully*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington 6th ed. 1785).



duties; without failure of performance; honestly; exactly.”<sup>139</sup> These definitions are also consistent with modern-day definitions of “faithfully.”<sup>140</sup>

Thus, on its face, the Take Care Clause undoubtedly requires “honesty.”<sup>141</sup> But it also suggests a requirement that some sort of reasonable inquiry be undertaken to find the relevant facts. After all, in order to avoid a “failure of performance,” some action must be “performed.” If this is correct, then based on the text of the Take Care Clause, where a law provides that a power is contingent on the President first making a factual determination, to “execute” that law “faithfully,” the factfinding must be done, at the least, “honestly,” and with some sort of “performance,” if not “exactly.”<sup>142</sup>

This requirement of “performance” or “exact[itude]” suggests that the President must engage in some sort of reasonable inquiry—some process—to find these facts.<sup>143</sup> Although one might define “reasonable inquiry” in any number of ways, I mean it to suggest that the President is obligated to consider available, or reasonably available, information at her disposal. Of course, what is “reasonable” in this context might be debatable. In some instances, the facts might be so

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139. *Faithfully*, 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828); see also Kent, Leib & Shugerman, *supra* note 136 (manuscript at 8) (“Our first finding, consistent with usage reported in contemporaneous dictionaries, is that faithful execution was repeatedly associated in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office.”); *id.* at 20 & nn. 99–100 (listing Founding-era dictionary definitions of “faithfully”).

140. See, e.g., *Faithfully*, OXFORD ENGLISH DICTIONARY 680 (2d ed. 1989) (including in definition: “assuredly, in truth,” and “with strict adherence to duty, conscientiously”); *Faithfully*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998) (including in definition: “strict or thorough in the performance of a duty”; “true to one’s word, promises, vows”; and “reliable, trusted, or believed”); *Faithful*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1981) (including in definition: “firm in adherence to promises, oaths, or undertakings: firm and thorough in the observance of duty: conscientious”).

141. See also *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 626 (1823) (stating that performance of duties “faithfully” means “*honestly*: not with perfect correctness of judgment, but *honestly*”).

142. See Delahunty & Yoo, *supra* note 36, at 799 (“The Take Care Clause is thus naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, ‘without failure’ and ‘exactly.’” (quoting *Faithfully*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J & P Knapton et al. 1755))); Goldsmith & Manning, *supra* note 133, at 1857–58 (“[T]he Take Care Clause might be understood as an instruction to the President to ensure that the laws are implemented honestly, effectively, and without failure of performance.”).

143. This is also consistent with what Kent, Leib, and Shugerman have called a “duty of diligence” implicit in the “faithful execution” language of the Take Care Clause. See Kent, Leib & Shugerman, *supra* note 136 (manuscript at 10, 66, 75); see also *id.* at 75 (“The implication here is that faithful execution requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of the principal or purpose specified by the authorizing instrument or entity.”).

obvious as to require little or no consultation, but in others, the factfinding would require, at the least, consideration of evidence already at the executive branch's disposal, as well as an effort to garner relevant evidence when doing so is reasonable in relation to the governmental interest at stake. "[P]erforming" the factfinding duty need not require going to the ends of the earth, but doing the sort of investigation any reasonable person would do to ensure that the facts found were found "faithfully"—that is, honestly, without failure of performance, exactly. Of course "reasonable inquiry" and "honesty" are capacious terms, and it is hard to definitively identify what would be required to satisfy them. Yet, capaciously defined terms are hardly new to constitutional law and often do have bite.<sup>144</sup>

In short, the text of the Take Care Clause as applied to presidential factfinding powers supports the notion that the President must find facts "honestly" and based on "reasonable inquiry."<sup>145</sup>

### B. Structure

#### 1. General Structural Reasons

Requiring the President to be honest and engage in reasonable inquiry in conducting factfinding is also implicit in the Constitution's separation of executive, legislative, and judicial power.<sup>146</sup> The President *executes* the law; she does not create it. If the law requires her to find particular facts in order to exercise a power, but she need not be honest

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144. Cf. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1267 (1975):

My rather enigmatic title, "Some Kind of Hearing," is drawn from an opinion by Mr. Justice White . . . . He stated, "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." The Court went on to hold that the same not altogether pellucid requirement prevailed where the deprivation was of liberty.

(quoting *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974)).

145. Indeed, such a duty to be honest and engage in reasonable inquiry seems to me to be a much more straightforward inference from the Take Care Clause than some of the powers—like removal of officers or control of executive prosecution—that the clause has been said to include.

146. John Manning has argued that, contrary to mainstream theories of separation of powers, there is no freestanding separation of powers doctrine in the Constitution. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011). Because this Part gives a positive, descriptive account of what obligations apply to the President, I assume for purposes of this Article that the separation of powers principles relied on by the Court govern. See, e.g., Metzger, *supra* note 127, at 83–84 (discussing Manning's work, but noting that general separation of powers principles "remain[ ] . . . a basic aspect of the Court's jurisprudence on constitutional structure"); see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) ("[T]he Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.").

or engage in any inquiry in finding those facts, it is hard to see how she is executing the *law*, rather than operating on her own notions of when power ought to be exercised. In such a world, the President would, in effect, be determining which facts give her authority to act—an act of making law, rather than execution.<sup>147</sup> This would be inconsistent with basic notions of separation of powers that lie at the core of the constitutional structure.<sup>148</sup> If the Constitution or Congress gives the President authority to act only upon her making certain factual determinations, then she must do so honestly and reasonably in order to call such factfinding “execution” at all.

Another way to think of this is that if the President exercises authority contingent on finding facts, and those facts are found dishonestly or arbitrarily, then the President does not have authority to act at all.<sup>149</sup> As Justice Cardozo put it, “If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfillment, there is in truth no delegation, and hence no official action, but only the vain show of it.”<sup>150</sup> If factfinding is done dishonestly or arbitrarily, then the condition in question has not been fulfilled, and the authority to act does not exist.

A requirement of honesty and reasonable inquiry in factfinding is further supported by the Constitution’s general aversion to arbitrary exercises of governmental power. As Lisa Bressman has argued, the basic structural features of the Constitution sought to ensure that the government did not act arbitrarily.<sup>151</sup> Government action must thus be for an “adequate, public-regarding purpose.”<sup>152</sup> But if the President finds facts in order to exercise authority dishonestly or without reasonable inquiry, then such factfinding *is* arbitrary—it has no

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147. Cf. Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1152 (2014) (“In practice, complete power to post the relevant facts would be little different from complete power to specify the legal standard.”).

148. See *supra* note 146.

149. See Stack, *Reviewability*, *supra* note 10, at 1199 (“[A] basic premise of constitutional law . . . is that every public actor must have legal authorization for his or her actions; without authority from either a constitutional or statutory source, the official has no authority to act.”).

150. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 448 (1935) (Cardozo, J., dissenting).

151. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 499–500 (2003) (“[S]eparation of powers was intended not merely to require Congress and the President to act independently of one another, but also to act in a nonarbitrary, public-regarding manner.”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1533–34 (1991) (“[T]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)) (internal quotation marks omitted)).

152. Bressman, *supra* note 151, at 496, 498.

“adequate, public-regarding purpose”; its conclusions are not predicated on adequate evidence.<sup>153</sup> Such factfinding is no better than “because the President said so.”<sup>154</sup>

Requiring honesty and reasonable inquiry in finding facts is also required by fundamental rule of law norms.<sup>155</sup> As Louis Jaffe put it:

The “law” does not operate in a vacuum. The application of law requires a factual predicate; an action without such a predicate is lawless. A finding of fact which is based on no more than the will or desire of the administrator is lawless in substance if not in form.<sup>156</sup>

Although Jaffe’s conclusion is focused on administrative agencies, there is no reason why this point should not apply to the President herself.<sup>157</sup> Requiring the President be honest and engage in reasonable inquiry in finding facts protects against her premising factual findings on “no more than [her] will or desire.”<sup>158</sup>

## 2. The President as Information-Gatherer

Apart from these general structural reasons, this duty is also supported by functional considerations underlying specific provisions of the Constitution. Several clauses in the Constitution require the President to gather information and convey it to Congress. The State of the Union Clause requires the President to “from time to time give to the Congress Information of the State of the Union,”<sup>159</sup> and the Recommendations Clause requires that the President “recommend to

153. *See id.* at 496 (stating that government officials act arbitrarily when they are “not rational, predictable, or fair,” or when they “generate[] conclusions that do not follow logically from the evidence”); *see also* *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91–92 (1913) (“A finding without evidence is arbitrary and baseless.”).

154. Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 526 (2014) (“A simple because the ‘President said so’ would be arbitrary.”).

155. Of course, there is no “rule-of-law” clause in the Constitution, *cf.* Cass Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1937 (2018), but interpreters frequently rely on rule-of-law notions in constitutional interpretation. *See, e.g.*, Bressman, *supra* note 151, at 496; Kagan, *supra* note 123, at 2351 (suggesting that “rule of law principles” prevent all exercises of presidential authority from falling outside judicial control); Masur, *supra* note 10, at 483 (“Judicial guardianship over the ‘rule of law’ demands meaningful inquiry into the factual predicates of executive action.”).

156. JAFFE, *supra* note 28, at 595.

157. *Cf.* Masur, *supra* note 10, at 492 (“No principled line exists to confine hard look review to the domain of administrative agencies.”). Indeed, we might want more, not less, process for the President than for agency heads. *See infra* text accompanying notes 249–251 (noting that more process might be justified because of the breadth and scope of the presidential power and lack of judicial review).

158. *Cf.* JAFFE, *supra* note 28, at 595 (“A finding of fact which is based on no more than the will or desire of the administrator is lawless in substance if not form.”).

159. U.S. CONST. art. II, § 3.

[Congress's] Consideration such Measures as he shall judge necessary and expedient."<sup>160</sup>

As early constitutional commentators pointed out, these clauses were premised on the notion that the President had superior access to information and therefore should be required to convey it to Congress.<sup>161</sup> In a recent opinion on the Recommendations Clause, OLC relied on this rationale, noting that the President was obligated to recommend legislation he deemed necessary and expedient because

[the Founders] believed that, "[f]rom the nature and duties of the executive department, he must possess more extensive sources of information . . . than can belong to congress," and so must be uniquely equipped "at once to point out the evil [that merits a legislative response], and to suggest the remedy."<sup>162</sup>

This conception of the President as better able to gather information is further supported by standard justifications for judicial and congressional deference to the executive, which rely on the executive's ostensible superior ability to gather facts.<sup>163</sup>

This notion that the President is better able to gather information and ought to be *required* to convey it to Congress seems to assume a fortiori that she do so honestly and with reasonable inquiry.

160. *Id.*

161. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 172 (Philadelphia, Phillip H. Nicklin, Law Bookseller, 2d ed. 1829):

[He is] supplied by his high functions with the best means of discovering the public exigencies, and promoting the public good, he would not be guiltless . . . if he failed to exhibit on the first opportunity, his own impressions of what it would be useful to do, with his information of what had been done.

JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1555, at 413 (Boston, Hilliard, Gray & Co. 1833) ("There is great wisdom . . . in requiring[ ] the president to lay before congress all facts and information, which may assist their deliberations . . .").

162. Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 40 Op. O.L.C., 2016 WL 10590110, at \*5 (2016) (quoting STORY, *supra* note 161, § 1555, at 412–13) (second and third alterations in original).

163. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries."); *cf.* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608 (2016) ("Of the three branches of the national government, the Executive is by far the most knowledgeable . . ."). *But see, e.g.*, Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1567 (2009) ("[T]here is nothing inherent in the structural constitutional design of Congress that prohibits it from getting independent information, or even from sharing access to information that the executive has . . ."). The Opinions Clause provides further support for this notion by giving the President the authority to ask subordinates for information in their relevant areas of expertise. U.S. CONST. art. II, § 2.

*C. Supreme Court Precedent*

A requirement of honesty and reasonable inquiry in factfinding is also supported by Supreme Court case law. Although the Court has never directly addressed the President's obligations in finding facts, numerous precedents strongly suggest that the Court has viewed the President's factfinding duties as requiring honesty and reasonable inquiry.

This is particularly true in the nondelegation doctrine domain, where the Court has repeatedly upheld delegations of factfinding authorities on the notion that the President had to "ascertain" the relevant fact in order to exercise the authority.<sup>164</sup> Such "ascertainment" seems to assume honesty and reasonable inquiry. For example, in *Field v. Clark*, the Court rejected an argument that a statute requiring the President to suspend duty-free status on certain goods if he determined that a foreign government had imposed duties that he "deem[ed] to be reciprocally unequal and unreasonable" violated the nondelegation doctrine.<sup>165</sup> The Court noted that "[t]he words 'he may deem' . . . of course implied that the president would examine the commercial regulations" of the relevant countries "and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary."<sup>166</sup> It ultimately held that there was no nondelegation problem, as

the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws . . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.<sup>167</sup>

In short, the Court assumed that the President was required to "examine" certain regulations in order to "ascertain" the relevant facts. Clearly the Court assumed that the President had to be honest and engage in reasonable inquiry in doing so.

Indeed, this reasoning underpins many of the Court's nondelegation cases, where the Court has assumed that if the President is required to find facts to exercise authority, the President's duty is to "ascertain" whether they exist.<sup>168</sup> In short, Congress has a long history

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164. See *infra* note 168.

165. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892).

166. *Id.* at 693 (quoting Tariff Act of 1890, § 3, 26 Stat. 567, 612).

167. *Id.*

168. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) ("The essentials of the legislative function are preserved when Congress authorizes a statutory command to become

of delegating authority to the President contingent on finding facts, and the Court has held that such factfinding authority is constitutional precisely because it viewed the President as obligated to be honest and engage in reasonable inquiry in finding the relevant facts.

Of course, the modern nondelegation doctrine is famously “toothless.”<sup>169</sup> The Court has stated that “[o]nly if we could say that there is an *absence of standards* for the guidance of the [President]’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding [the statute].”<sup>170</sup> Yet, if the President need not be honest or engage in any reasonable inquiry in conducting factfinding, not even this minimal standard would be met. In such a situation, there *would* be an “absence of standards” guiding the President’s actions. In short, if the President need not be honest or engage in any reasonable inquiry in finding facts authorizing her to act, she is not constrained at all by the facts the law dictates she must find. In such a world, she is not executing that law, but making it—or, perhaps more to the point, breaking it.<sup>171</sup>

A duty to be honest and engage in reasonable inquiry is also implicit in the Court’s presumption of regularity cases. In *Martin v. Mott*, the Court rejected a challenge to President Madison’s having called forth the militia on the basis of his finding that the United States was “in imminent danger of invasion” from a foreign nation.<sup>172</sup> Refusing

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operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government.”); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 444 (1935) (Cardozo, J., dissenting) (“The will to act being declared, the law presumes that the declaration was preceded by due inquiry and that it was rooted in sufficient grounds.”); *id.* at 437–38 (“He is to study the facts objectively, the violation of a standard impelling him to action or inaction according to its observed effect upon industrial recovery . . . .”); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 410–11 (1928) (“What the President was required to do was merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect.”). Indeed, part of the reason the Court struck down the law in *Schechter Poultry* that permitted the President to promulgate codes regulating poultry was the lack of requisite process in finding facts. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935) (noting that, unlike permissible delegations, the statute “does not . . . prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure”).

169. Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1016 (2015).

170. *Yakus v. United States*, 321 U.S. 414, 426 (1944) (emphasis added).

171. *Cf. Panama Refining*, 293 U.S. at 431–32:

To hold that he is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.

172. 25 U.S. 19, 29–30 (1827).

to assess the President's factfinding, the Court applied a "presumption of regularity," pursuant to which courts assume that when the President acts, he does so "in obedience to his duty, until the contrary is shown."<sup>173</sup> The Court grounded the presumption in the Take Care Clause, noting that the power at issue was vested in the President, "whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to *his belief of the facts*."<sup>174</sup> Thus, although the Court declined to review the President's factfinding, it did so based on the presumption that the President would fulfill his constitutional obligations to find those facts honestly.<sup>175</sup> Justice Cardozo later made clear that (at least in his view) the presumption of regularity required not just honesty but also some process in making the factual determination, noting that "the law presumes that the declaration [at issue in *Mott*] was preceded by *due inquiry* and that it was *rooted in sufficient grounds*."<sup>176</sup> In short, although the presumption of regularity primarily serves to shield executive branch decisionmaking from judicial review, its very premise is that such lack of review is justified by the "presumption" that the President will fulfill his duties of finding facts honestly and with reasonable inquiry.<sup>177</sup>

This duty also finds support from a perhaps surprising place: the Supreme Court's recent opinion in the so-called Travel Ban case. There, President Trump exercised statutory authority to suspend the entry of certain classes of aliens, upon "find[ing] that the[ir] entry . . . would be detrimental to the interests of the United States."<sup>178</sup> The Court found that the President fulfilled the statute's "sole prerequisite" that he "'find[ ]' that the entry of the covered aliens 'would be detrimental to the interests of the United States,'" precisely because of the real-world investigation and decisionmaking process the executive branch went through before making the finding, repeatedly emphasizing the depth

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173. *Id.* at 32–33.

174. *Id.* at 31 (emphasis added).

175. See *Sterling v. Constantin*, 287 U.S. 378, 399 (1932) (noting that the President's authority to call militia "necessarily implies that there is a permitted range of *honest* judgment as to the measures to be taken" (emphasis added)).

176. *Panama Refining*, 293 U.S. at 444 (Cardozo, J., dissenting) (emphasis added).

177. Cf. Stack, *Reviewability*, *supra* note 10, at 1173–77 (explaining origins of current doctrine that "operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power"); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2193, 2257 (2018) (suggesting judicial deference is premised on notion that "the President is exercising superior institutional resources, and doing so in a manner at least minimally responsive to rule-of-law values").

178. 8 U.S.C.A. § 1182(f) (West 2019).



of the “worldwide, multiagency review” that preceded it.<sup>179</sup> Thus, although the Court was not willing to substantively review the evidence underlying the finding, the crux of the Court’s ruling that the finding requirement was satisfied was that the finding was predicated on facts found through what the Court viewed as robust, executive process.<sup>180</sup>

These cases dealt with statutory, not constitutional, authorities and are thus admittedly less directly applicable to constitutional authorities. However, these cases do not seem to rest on implicit statutory intent but rather on the nature of executing the law. The fundamental point is that *execution* of the laws requires good faith adherence to them. If a law requires the President to find facts to

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179. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–09 (2018):

The President has undoubtedly fulfilled [the] requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments . . . deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries.

(second alteration in original) (citation omitted) (quoting Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017)); *id.* at 2408, 2412, 2417 (emphasizing “the multi-agency review process”).

180. See, e.g., *id.* at 2421 (“The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. . . . [I]n each case the determinations were justified by the distinct conditions in each country.”). Indeed, the lack of process underlying the first two versions of the ban are likely why they were enjoined and what led to the review process underlying the third version. See Kate Shaw, *Statements and Standards in Trump v. Hawaii*, HARV. L. REV. BLOG (June 28, 2018), <https://blog.harvardlawreview.org/statements-and-standards-in-trump-v-hawaii> [<https://perma.cc/5SPZ-Y5VS>] (“It was only after receiving a clear message that the Administration could only act to restrict immigration following a process that involved real inter-agency consultation, and where the order was predicated on some genuine national-security need identified by executive-branch officials, that the Administration produced the policy under review.”). One might object that the Court failed to assess whether the finding was “honest” because it applied an objective, rational basis test to the Establishment Clause challenge. *Trump v. Hawaii*, 138 S. Ct. at 2417. The use of an objective test, however, seemed to be based on prudential concerns about the Court’s unwillingness to second-guess the President’s factual findings in the national security domain, rather than any sort of endorsement of the President’s power to dishonestly find facts. See, e.g., *id.* at 2419–21 (noting deference to national security factual judgments and that there was “persuasive evidence that the [ban] has a legitimate grounding in national security concerns”); *cf. id.* at 2420 (distinguishing *Romer v. Evans* because the amendment at issue in that case “was ‘divorced from any factual context from which we could discern a relationship to legitimate state interests’” (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996))). Indeed, the whole point of Justice Kennedy’s concurrence was to emphasize that the President is still bound by constitutional duties, even where the Court is not willing to review whether they have been honored. See *id.* at 2423–24 (Kennedy, J., concurring) (“There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects.”).

exercise authority, in order to execute those laws, the President must find those facts honestly and based on reasonable inquiry.

#### *D. Historical Practice*

A duty to be honest and engage in reasonable inquiry is also supported by historical executive branch practice. People are naturally wary of recognizing new constitutional duties on the government, but this Section shows that there is good evidence that such a duty is not new at all. This Section establishes that numerous internal executive branch legal interpretations implicitly assumed that the President must be honest and ground his factual determinations in available evidence and that this duty has been abided by in at least some high-profile exercises of presidential authority.

That said, the point of this Section is not to provide a full historical account of how presidents have found facts since the Founding era sufficient to provide definitive “historical gloss” on the Constitution’s meaning.<sup>181</sup> As I have explained elsewhere, although historical practice can be relevant to constitutional interpretation in certain situations, we must engage in a careful contextual inquiry before inferring from the fact that a branch has acted in a certain way that the branch viewed that action as constitutionally obligatory.<sup>182</sup> Such a comprehensive inquiry is necessarily outside the scope of this Section. The hope of this Section, instead, is to provide evidence that such a duty would not be wholly novel or burdensome. To the contrary, there is good evidence that at least some prominent attorneys general and presidents believed that the President must be honest and engage in reasonable inquiry in finding facts.

Since the Founding era, executive branch lawyers have frequently assumed that presidents must be honest and ground their findings in available evidence. In an 1823 opinion, Attorney General William Wirt concluded that the Take Care Clause required the President to ensure that subordinate officers executed the law “faithfully—that is, honestly”—and that if the President was made aware of any malfeasance he would be “constitutionally bound to look

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181. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (assessing use of “historical gloss” arguments in separation of powers debates).

182. See generally Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016).

to the case” to ensure the malfeasance was corrected.<sup>183</sup> An 1853 Attorney General Opinion suggested that before granting a pardon prior to a conviction, “[t]here must be satisfactory evidence of some kind as to the guilt of the party,” suggesting a requirement that an inquiry into the facts be made.<sup>184</sup> Four years later, the Attorney General suggested that the President had a duty to inquire into the fitness of certain individuals he intended to appoint as officers, noting that such an inquiry “may depend, on a mass of facts, covering more or less of time, and constituting the history of the person. These facts it is the duty of the President, in all cases of nomination to office, to determine as he best may, by personal or by communicated knowledge.”<sup>185</sup> An 1860 Attorney General Opinion on the eve of the Civil War concluded that, before calling forth the militia pursuant to a finding that the laws of the United States could not be enforced by ordinary judicial proceedings, their “incapacity to cope . . . shall be plainly demonstrated. It is only upon clear evidence to that effect that a military force can be called into the field.”<sup>186</sup> Thus, even in dire circumstances, the Attorney General seemed to assume a duty to be honest and engage in reasonable inquiry in finding facts.

In 1881, the Attorney General again seemed to assume the President would act honestly and based on reasonable inquiry before finding predicate facts in concluding that the “President must necessarily first ascertain to his own satisfaction” relevant facts necessary to drop servicemembers from the army rolls and that the “ascertainment” of these facts were placed “wholly in the hands of the Chief Executive, who must naturally have been expected to resort to the official records of the War Department as one source, at least, of information.”<sup>187</sup> A 1910 Attorney General Opinion also supports the duty. In discussing an authority allowing the President to impose a tariff regime if he determined that a German Tax “unduly

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183. *The President & Accounting Officers*, *supra* note 141, at 626 (emphasis omitted); *see also* *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482, 489 (1831) (making similar point).

184. *See* *Pardoning Power of the President*, 6 Op. Att’y Gen. 20, 21 (1853) (suggesting that the prosecutor “be required to communicate any facts, which, in his opinion, may contribute to inform the conscience of the President in the premises”); *see also* *Office and Duties of Attorney General*, 6 Op. Att’y Gen. 326, 350 (1854) (“The conscientious determination of [whether to grant pardons] requires, generally, the investigation of proceedings in court, and that of questions of law as well as of evidence . . .”).

185. *The Navy Efficiency Acts*, 8 Op. Att’y Gen. 335, 351 (1857).

186. *Power of the President in Executing the Laws*, 9 Op. Att’y Gen. 516, 522 (1860).

187. *Case of Walker A. Newton*, 17 Op. Att’y Gen. 13, 15 (1881).

2019]

*PRESIDENTIAL FACTFINDING*

867

discriminate[d] against the United States,” the Attorney General noted that to make the relevant determination

[c]learly . . . the President should consider not only the several intricate and subtle provisions of the [German law], and their relationship to each other, but also their bearing upon the commercial conditions existing between the citizens of this country and the owners of potash mines in Germany, and ascertain therefrom whether this provision of the German law must and does in fact work a discrimination against the United States.<sup>188</sup>

The Attorney General added that whether the finding could be made “must be determined upon the conditions and facts *actually existing*.”<sup>189</sup>

One of the more explicit statements of a duty to be honest and engage in reasonable inquiry in finding facts was penned by Deputy Attorney General Nicolas Katzenbach regarding the use of federal troops for law enforcement in Mississippi in 1964.<sup>190</sup> The memo addressed calls by civil rights groups and members of Congress to use federal personnel to prevent further violence against civil rights workers in Mississippi. Katzenbach explained that the President had statutory authority to use military force when the President deemed it necessary to enforce federal law,<sup>191</sup> but concluded that “in view of the extreme seriousness of the use of those [authorities], . . . the government should have more evidence than it presently has of the inability of state and local officials to maintain law and order—as a matter of wisdom as well as of law.”<sup>192</sup> Katzenbach thus clearly suggested that the President’s factfinding required not only honesty but also reasonable inquiry—more investigation had to be done before the determination could “as a matter of . . . law” be made.

This duty is also supported by modern OLC opinions that frequently assume the President must “reasonably” make requisite factual findings. For example, a 1982 opinion on presidential authorities to respond to “Severe Energy Supply Interruptions” noted that “[t]he scope of the President’s authority under these statutes necessarily depends on the particular facts presented by any future petroleum shortage,” and further observed:

[T]o the extent that the President’s authority under certain statutes rests on a discretionary presidential finding . . . that an emergency situation exists or that actions

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188. *Potash Mined in Ger.—Antitrust Laws—Discriminatory Exp. Duty*, 31 Op. Att’y Gen. 545, 556–57 (1910).

189. *Id.*

190. *Use of Marshals, Troops, & Other Fed. Pers. for Law Enf’t in Miss.*, 1 Supp. Op. O.L.C. 493 (1964).

191. *Id.* at 496 (discussing authority under 10 U.S.C. §§ 332–333 (1964) (now codified at 10 U.S.C.A. §§ 252–253 (West 2019))).

192. *Id.* at 498.

are necessary and appropriate “in the national interest,” [or] to promote the “national defense,” . . . it is impossible to determine in the absence of specific facts when exercise of that authority would be consistent with the terms of the statute.<sup>193</sup>

Again, OLC was clearly acknowledging that the President’s determinations must be honest and grounded in the actual facts at issue.<sup>194</sup> A 1995 OLC opinion supports this conception quite well. With respect to a statute requiring sanctions upon a finding that individuals had knowingly contributed to the chemical weapons development of certain countries, OLC concluded that “the President has a *duty* to make the determinations specified in the statute if he is presented with sufficient evidence to compel [the relevant] conclusion.”<sup>195</sup> The opinion clearly suggests that the President is obligated to be honest and consider available and appropriate evidence before coming to the relevant factual conclusion.<sup>196</sup>

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193. Legal Auths. Available to the President to Respond to a Sever Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Prods., 6 Op. O.L.C. 644, 650 (1982).

194. See also Adjusting the Census for Recent Immigrants: The Chiles Amendment, 4B Op. O.L.C. 816, 818 (1980) (concluding that the President’s authority to call a special census if he determined a locality had experienced a surge in legal immigration required the President to “attempt accurately to estimate the total population”); April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, *supra* note 30, at \*10 (“We would not expect that any President would use [the] power [of the armed forces] without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation.”). The notion that the President must “reasonably” find relevant facts has also been present in numerous use of force opinions by OLC. See, e.g., April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, *supra* note 30, at \*22 (“The President reasonably determined that this operation would further important national interests in [inter alia] promoting regional stability . . .”); Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 30, 32 (2004) (“Thousands of Americans live in Haiti, and the President could reasonably conclude that they would be in danger if the country were to descend into lawlessness.” (citation omitted)); Auth. to Use Military Force in Libya, *supra* note 1, at \*12 (“Based on these factors, we believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.”). Indeed, even the notoriously executive-power friendly, post–September 11th George W. Bush OLC still grounded its conclusions on the notion that the President could make a particular factual determination based on particular evidence given to the office. See, e.g., Status of Taliban Forces Under Article 4 of the Third Geneva Convention, 26 Op. O.L.C. 1, 2 (2002) (“Based on the facts presented to us by [the Department of Defense], we believe that the President has the factual basis on which to conclude that the Taliban militia, as a group, fails to meet three of the four GPW requirements, and hence is not legally entitled to POW status.”).

195. Presidential Discretion to Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306, 310 (1995) (emphasis added).

196. OLC explicitly tied its reasoning to *J.W. Hampton’s* language that

the President may be considered “the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.” We believe that [this statute] casts the President in such a role, and requires him to make a determination *if the facts available to him* establish that the conditions described in the statute exist.

*Id.* at 309 (emphasis added) (citation omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 411 (1928)).

Apart from these internal executive branch legal opinions, a duty to be honest and engage in reasonable inquiry has been followed in practice, at least at times. For example, when George Washington called out the militia in response to the Whiskey Rebellion, he took great care in making the necessary factual findings under the Militia Act of 1792.<sup>197</sup> Washington relied on letters and affidavits documenting that an insurgency existed that could not be “suppressed by the ordinary course of judicial proceedings,”<sup>198</sup> as well as a detailed report requested of Alexander Hamilton on the history of resistance to the relevant tax in Pennsylvania.<sup>199</sup> The underlying factual finding was backed up by then-Attorney General William Bradford, who based his support on “an attentive consideration of the affidavits and documents which have been laid before the President.”<sup>200</sup> So earnestly did the cabinet seem to take the factfinding that Bradford went out of his way to disclaim any reliance on rumors that the British had been supporting the insurgents, because he did not think the allegations “sufficiently proved to be a ground of acting upon.”<sup>201</sup> In short, despite the seriousness of the situation, Washington appeared to exhibit a strong desire to be honest and engage in reasonable inquiry in finding the relevant facts authorizing him to call forth the militia.<sup>202</sup>

President Roosevelt also seemed to abide by such a duty in the lead up to America’s entry into World War II. Roosevelt wanted to send a number of destroyers and mosquito boats to England to aid in the war effort but was told by then-Attorney General Robert Jackson that such a deal was barred by a statutory provision providing that no ships could

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197. In particular, that the laws of the United States were “opposed, or the execution thereof obstructed . . . by combinations too powerful to be suppressed by the ordinary course of judicial proceedings” and that such a state of affairs was certified to the President by an Associate Justice. Act of May 2, 1792, § 2, 1 Stat. 264.

198. See Letter from Henry Knox, U.S. Sec’y of War, to George Washington, U.S. President (Aug. 4, 1794), <https://founders.archives.gov/documents/Washington/05-16-02-0354> [<https://perma.cc/6M6P-QHLJ>]. Knox noted that the papers and affidavits from people on the ground left “no doubt on the mind that the [requisite] opposition and combination . . . really exist.” *Id.*

199. See Letter from Alexander Hamilton, U.S. Sec’y of the Treasury, to George Washington, U.S. President (Aug. 5, 1794), <https://founders.archives.gov/documents/Washington/05-16-02-0357> [<https://perma.cc/7UV3-NCQC>] (providing such a report).

200. Letter from William Bradford, U.S. Att’y Gen., to George Washington, U.S. President (Aug. 5, 1794), <https://founders.archives.gov/documents/Washington/05-16-02-0356> [<https://perma.cc/X6WJ-WSVZ>].

201. *Id.* (emphasis omitted).

202. See also Andrew Kent & Julian Davis Mortensen, *Executive Power and National Security Power*, in THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 261, 266 (Karen Orren & John W. Compton eds., 2018) (“The story of the Whiskey Rebellion, in short, is one of a famously vigorous leader adhering to statutory limits in exacting detail, regardless of the inconvenience involved.”).

be transferred or exchanged unless they could be certified as “not essential to the defense of the United States.”<sup>203</sup> Roosevelt refused to approve the deal until he could legitimately conclude that the destroyers were “not essential”—a task accomplished by taking into account the use of bases the United States would receive in exchange for sending the destroyers, along with the benefits to the United States of the British having access to them.<sup>204</sup> “The prospect of a true exchange—the ships would be given in return for the important defensive outposts in the Caribbean that England possessed—was critical.”<sup>205</sup> Indeed, although Churchill strongly opposed having to provide any bases in exchange for the destroyers, Roosevelt refused to budge.<sup>206</sup> Churchill ultimately relented, and Jackson issued a published opinion relying, in crucial part, on the exchange rationale.<sup>207</sup> Whatever the validity of Jackson’s reading of the statute, the point is that, despite the high stakes, the President and his administration were not willing to find the relevant facts required to authorize the exchange of destroyers without adequate support. A duty to be honest and engage in reasonable inquiry was abided by.

As a final anecdotal example, before President Truman seized the steel mills, prompting the famous *Youngstown* case, he collected detailed findings and affidavits to support his factual claim that there was actually an emergency necessitating the seizure of the steel mills.<sup>208</sup> The clear intent was to show that he was not simply making up the emergency—that he honestly believed it was an emergency and

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203. See, e.g., DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS* 237–39 (2016) (discussing interactions between Roosevelt and Jackson during the deal).

204. See *id.* at 240–50 (discussing the Roosevelt administration’s decisionmaking process in approving the deal).

205. *Id.* at 244.

206. Instead, he had Jackson explain to Churchill that “American law . . . required a quid pro quo exchange.” *Id.* at 249.

207. *Id.* at 249–50.

208. Indeed, the first thing the dissent did was emphasize that there was ample factual basis underlying President Truman’s finding that seizing the steel mills was necessary to avert an emergency. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 569, 678–79 (1952) (Vinson, C.J., dissenting) (reviewing multiple affidavits filed by “Government officials describing the facts underlying the President’s order,” and concluding that “the uncontroverted affidavits in this record amply support the finding that ‘a work stoppage would immediately jeopardize and imperil our national defense’” (quoting Exec. Order No. 10340, 17 Fed. Reg. 3139 (Apr. 8, 1952))). And in upholding the President’s actions, Chief Justice Vinson repeatedly emphasized that the President’s factual finding was amply supported, noting that “[w]e do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare,” *id.* at 701, that “[t]here is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President’s finding of the existence of an emergency,” *id.* at 709, and that “[n]o basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case,” *id.* at 710.

that the determination had been made upon rigorous process and investigation.

In short, although I am not aware of an Attorney General or OLC opinion directly addressing the President's factfinding duties, the executive branch has seemingly long evinced an acceptance of a duty to be honest and engage in reasonable inquiry in finding facts that are predicates to exercising power. This is not to say that this duty was always abided by. It was not, as I will soon discuss. But examples of failure to adhere to the duty are not inconsistent with an executive branch view that such a duty exists. But we need not take the point that far. As noted above, this compilation of historical practice is not meant to provide conclusive evidence of "historical gloss" but rather to bolster the arguments for such a duty made above and provide evidence that such a duty would not be entirely novel. The foregoing has hopefully established that.

#### *E. Does the Duty Have Bite?*

In the sections above, I have tried to establish that the President must be honest and engage in reasonable inquiry in finding facts that are predicates to exercising authority. One natural response might be: So what? "Honesty" and "reasonable inquiry" hardly seem like the most onerous obligations. But this standard is not illusory. Such a standard would render the exercise of presidential authority unconstitutional, or otherwise unlawful, when the factfinding serving as a predicate for such authority is dishonest or conducted without reasonable inquiry—i.e., without consideration of reasonably available evidence. And unfortunately, there is a long history of presidents failing to meet even these relatively modest standards.

For example, both Presidents Madison and Monroe purportedly lied about facts that ostensibly permitted them to take over West and East Florida, respectively.<sup>209</sup> President Polk purportedly lied about

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209. See, e.g., Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 223 (1992) ("President James Monroe . . . lied to Congress about his purportedly 'defensive' seizure of East Florida—part of a covert plan to acquire the territory as 'indemnity' for supposed Spanish outrages."); *id.* ("President James Madison lied to Congress about the U.S. takeover of West Florida."); Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1, 24–28 (1977) (describing President Madison's false claim to Congress that he seized West Florida because "Spanish authority had been subverted" and seizure was "required to assure control of an area"); *id.* at 33–45 (describing President Monroe's claim that then-General Andrew Jackson had occupied East Florida as an "act of self-defense, additionally justified by Spain's failure to meet its treaty obligation to restrain the Indians in Florida from hostile acts against the United States," as highly



whether Mexico had attacked the United States on American soil leading to American use of force.<sup>210</sup> President Lyndon Johnson purportedly lied about the Gulf of Tonkin incident, which led to the first bombing attacks on North Vietnam and ultimately to congressional authorization for the war in Vietnam.<sup>211</sup> Johnson also reportedly lied about the reasons for the use of troops in the Dominican Republic.<sup>212</sup> And, of course, President Nixon lied about a great many things, including that he had national security predicates to justify the Watergate break-in and “black bag” jobs against antiwar groups and that the bombing of Laos and Cambodia was based on military necessity.<sup>213</sup> More recently, President Trump has been accused of lying or failing to have any reasonable process in a number of matters, including the initial versions of the Travel Ban and Transgender Military Ban.<sup>214</sup>

In short, when presidents lie or act arbitrarily, they violate their duty to find facts honestly and with reasonable inquiry. There will always be line-drawing problems about precisely when a President has been dishonest,<sup>215</sup> or when there has been a “lack of reasonable inquiry,”<sup>216</sup> but we know that presidents lie or arbitrarily find facts at

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questionable given private correspondence between Jackson and Monroe suggesting occupation was not required by self-defense).

210. ERIC ALTERMAN, *WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES* 16 (2004) (“In fact, no war with Mexico had existed until President James K. Polk falsely insisted that the southern nation had attacked an American army detachment on American soil.”).

211. HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 319 (2015); DAVID WISE, *THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER* 43–47 (1973).

212. BRUFF, *supra* note 211, at 323 (“Johnson misled Congress and the public by claiming the intervention was an attempt to protect American lives [following a coup], when it was in fact actuated by a concern that the new government might be leftist.”).

213. JOHN M. ORMAN, *PRESIDENTIAL SECRECY AND DECEPTION: BEYOND THE POWER TO PERSUADE* 125–126 (1980); David E. Hoffman, *Secret Archive Offers Fresh Insight into Nixon Presidency*, WASH. POST (Oct. 11, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/10/11/secret-archive-offers-fresh-insight-into-nixon-presidency> [<https://perma.cc/92PW-GBK9>] (stating that Nixon knew bombing Laos and Cambodia was not militarily effective but justified it as based on military necessity).

214. *See infra* note 229 (discussing Travel Ban); *supra* note 22 (discussing Transgender Military Ban).

215. *Cf., e.g.*, Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 77–78 (2015) (“[D]eterminations of what is (and is not) a lie in a particular situation can be deeply contested . . .”).

216. Not all historical claims of presidents acting on false premises arose from outright dishonesty. Some arose from a deliberate failure to investigate facts motivated by fear of finding out something the President did not want to know. *See, e.g.*, Sofaer, *supra* note 209, at 19–23 (describing how Madison accepted the French claim that American ships would not be interfered with, despite reports of continuing interference, because it would allow him to issue proclamation that France had stopped interfering with American ships in order to pressure Britain).

2019]

*PRESIDENTIAL FACTFINDING*

873

times, and this Part has sought to establish that when they do, they violate the law.

## III. REGULATING PRESIDENTIAL FACTFINDING

Now that the descriptive scope of presidential factfinding and the existing positive legal obligations on the President have been identified, we can turn to how presidential factfinding ought to be conducted in a normatively desirable way. How *ought* the President find facts, and how *ought* the President's factfinding be reviewed in order to best ensure she abides by her constitutional duty to be honest and engage in reasonable inquiry? This Part seeks to make progress in answering these questions by exploring how presidential factfinding ought to be regulated through internal executive branch structures, congressional regulation, and judicial review.

*A. Executive Branch Regulation of Presidential Factfinding*

In 1942, in discussing factfinding in the burgeoning administrative state, Kenneth Culp Davis stated that

no one who studies the administrative process would attempt to draw a line through the multifarious fact-finding functions and say: "Now, this is adjudication; here we must have some system of evidence. That, on the other hand, is legislative (or executive, or administrative, or unclassifiable); therefore fact-finding may be carried on without any rules of evidence and without anything to take their place."<sup>217</sup>

The point Davis was making is intuitive and important. When someone is tasked with finding facts in order to exercise authority, there ought to be some system in place that governs how those facts are found. Yet, for presidential factfinding, there often appears to be no such system. This lack of preset process is particularly worrisome given the broad range of power the President possesses. In response to this state of affairs, this Section seeks to make progress in identifying how presidential factfinding ought to be conducted to best ensure the President abides by her duty to honestly and reasonably find facts. It first examines the current state of affairs, pursuant to which there often appears to be no preset process or standard of certainty, and then addresses what processes and standards of certainty the President ought to use in finding facts.

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217. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 367 (1942).

## 1. Process

What process ought the President use in finding facts that serve as predicates for exercising power? A definitive answer to this question would require assessing a number of factors, including the potential benefits and costs of any particular process, the effects such process would have on encouraging or discouraging exercises of presidential power, the importance of such exercises of presidential power, and so on. Because these factors are hard to assess and will often be contestable, the aim of this Part is more modest.<sup>218</sup> Rather than seeking to identify an optimal preset process for presidential factfinding, this Part instead seeks first to provide an account of existing practice, pursuant to which there often appears to be *no* preset process for finding facts; then, to make an argument that *some* preset process is normatively desirable; and finally, to set forth a preliminary menu of options for thinking about how such a process might be structured. It concludes by providing a concrete example of what such process might look like and by addressing how the costs of such process might be dealt with.

So, how does the President find facts today? The unfortunate answer is that we lack any comprehensive account. And because there is no systematic mechanism by which factfinding processes are revealed to the public, what exists in the public record is dispersed and necessarily incomplete. As a result, this Part cannot provide a full account of how the President finds facts today but instead surveys what can be gleaned from the public record. It reveals that although there are examples of publicly known, preset processes for certain instances of factfinding, there does not appear to be any sort of generally applicable, formal process for how the President finds facts.

To start, there are some places where the President has instituted and made public a fairly robust, preset process for finding facts that are used as predicates for exercising power. For example, a preset factfinding process has been created for certain decisions regarding use of military force against suspected terrorists,<sup>219</sup> as well

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218. Cf. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1270 (2018) (noting difficulty of fully assessing institutional reform proposals in the context of presidential power).

219. See W.H. REPORT, *supra* note 50, at 24–26:

[D]ecisions to capture or use lethal force against terrorist targets outside areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise. [The PPG] sets forth a decision making process for operations whereby senior national security officials . . . review and inform proposals to ensure that the legal and policy standards are met [and includes]

as for making the required statutory findings to authorize “covert action.”<sup>220</sup> And surely there are other examples of which I am not aware.<sup>221</sup> But as a general matter, there does not appear to be any sort of systematic process for how facts serving as predicates for exercising power are found.<sup>222</sup>

Indeed, even in areas where exercises of presidential power are governed by formal process, the process for how relevant facts are found is often unstated. For example, one of the primary forms of exercising presidential power is through executive orders and proclamations,<sup>223</sup>

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procedures for after-action reports as well as requirements for congressional notification.;

*Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, WHITE HOUSE 3 (May 22, 2013), <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf> [<https://perma.cc/C6TN-BNLA>] (setting forth detailed interagency process requiring interagency clearance and “at a minimum . . . near certainty that an identified [High Value Target] . . . is present . . . [and] near certainty that non-combatants will not be injured or killed” and, if lethal force is employed, “an assessment that capture is not feasible at the time of the operation”).

220. To authorize covert action, the President must find that such action is “necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States.” 50 U.S.C.A. § 3093(a) (West 2019). Presidents have installed a fairly robust process for making this finding, which appears to include processes for finding the requisite facts. *See, e.g.*, William J. Daugherty, *Approval and Review of Covert Action Programs Since Reagan*, 17 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 62, 74–75 (2004) (describing process); Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 708 (2016) (“[T]he ‘systematic, institutionalized process’ underpinning covert action is designed to evaluate ‘effectiveness, risk, and policy adherence.’” (quoting Daughtery, *supra*, at 75)). To be sure, scholars debate whether the process is rigorous enough, *id.* at 708 (collecting sources), but the President appears to have sufficiently focused on this area to ensure the finding is grounded in, among other things, rigorous factfinding. *See* Daugherty, *supra*, at 74–75.

221. The Obama administration National Security Council’s (“NSC”) governing document called for the Deputies Committee to ensure that “all papers to be discussed by the NSC . . . fairly and adequately set out the facts.” *Presidential Policy Directive – 1: Organization of the National Security Council System*, WHITE HOUSE 4 (Feb. 13, 2009), <https://fas.org/irp/offdocs/ppd/ppd-1.pdf> [<https://perma.cc/5RXX-YC62>] [hereinafter PPD 1]. However, the document does not explain the process for how those “facts” are found. Such processes might exist, but I have not found them in the public record.

222. When the President delegates power to agency heads, their exercise of power is subject to the APA’s requirements. *See, e.g.*, Renan, *supra* note 177, at 2223. Presidential factfinding authorities, however, are all directly delegated to the President, not agency heads, and, therefore, while the President may *choose* to exercise some factfinding authorities through agency heads, other exercises will not be conducted through agencies. In those contexts, there appears to be no systematic, preset process in place that governs how factfinding is conducted.

223. *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 19–115, 171–207 (2014) (discussing executive orders and proclamations as key tools of presidential direct action); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 5 (2001) (noting the historic importance of executive orders); Manheim & Watts, *supra* note 17 (manuscript at 22) (“Executive orders—along with other kinds of unilateral written directives, such as those contained in presidential memoranda and proclamations—serve as an extraordinarily important tool in the President’s toolkit.”).

which frequently rely on factfinding.<sup>224</sup> Approval of such directives is governed by Executive Order (“E.O.”) 11030, which requires that proposed directives be submitted to the Director of the Office of Management and Budget, along with a letter from the authorizing official at the originating agency “explaining the nature, purpose, background, and effect of the proposed Executive Order or proclamation.”<sup>225</sup> If the Director approves the proposed order, then it is transmitted to the Attorney General for “his consideration as to both form and legality,” a review function that has since been delegated to OLC.<sup>226</sup> While proposed orders often go through interagency clearance and review before they are approved, such interagency process is not required by the formal document and some directives do not go through such review.<sup>227</sup> But even for orders that do go through interagency review, there does not appear to be any formal process requiring articulation of or sign-off on the facts that underlie the exercise of authority.

This failure to require articulation of underlying facts and any process to ensure predicate facts are reasonably found in the executive order context is perhaps best encapsulated by President Trump’s first iteration of the Travel Ban. Although that version was approved for “form and legality” by OLC,<sup>228</sup> it reportedly was not accompanied by any

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224. As just a sampling, see, for example, Proclamation No. 9687, 82 Fed. Reg. 61,413 (Dec. 22, 2017) (suspending trade status for Ukraine because it was not “providing adequate and effective protection of intellectual property rights”); Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 15, 1971) (invoking authority to impose price, rent, wage, and salary stabilization requirements upon concluding they were necessary “to stabilize the economy, reduce inflation, and minimize unemployment” and that the “present balance of payments situation ma[d]e[] [doing so] especially urgent . . . to improve our competitive position in world trade and to protect the purchasing power of the dollar”); and Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952) (ordering seizure of steel mills because *inter alia* “it is necessary that the United States take possession of and operate the plants” “in order to assure continued availability of steel . . . during the existing emergency”).

225. Exec. Order No. 11,030, § 2(a), 27 Fed. Reg. 5847 (June 19, 1962).

226. *Id.* § 2(b); 28 C.F.R. § 0.25(b) (2018) (assigning task to OLC).

227. See, e.g., Eliana Johnson et al., *Hasty Immigration Order Gives Way to West Wing Tensions*, POLITICO (June 22, 2018, 9:52 PM), <https://www.politico.com/story/2018/06/22/trumps-quick-fix-on-family-separations-unleashes-internal-tensions-667175> [https://perma.cc/S4ND-NM4T] (describing typical interagency process); cf. MAYER, *supra* note 223, at 61 (suggesting such review limited to “particularly complex or far-reaching orders”); Andrew Rudalevige, *The Contemporary Presidency: Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138, 150 (2012) (suggesting “White House-driven orders” were only “usually” subject to such clearance). And some orders skip the formal process altogether. See MAYER, *supra* note 223, at 60–61 (“[W]hen the White House is under time pressure it routinely bypasses the formal routine.”).

228. Memorandum from Curtis E. Gannon, Acting Assistant Att’y Gen. (Jan. 27, 2017), <https://assets.documentcloud.org/documents/3442905/EO-Foreign-Terrorist-Entry.pdf> [https://perma.cc/W632-L6HD].

real internal review to ensure that the factual predicates underlying the exercise of authority could justifiably be found.<sup>229</sup> In short, even in the fairly formal, proceduralized context of executive orders and proclamations, ensuring rigorous factfinding appears to be left out of the picture.

Similarly, although a wave of recent scholarship has documented how presidential exercises of power are subject to fairly rigorous legal review before they are approved,<sup>230</sup> it remains unclear precisely how this legal review applies to the underlying facts that serve as predicates for exercising power. For example, even in OLC's formal opinions, there does not appear to be any uniform approach to vetting underlying facts—sometimes the facts are taken as stipulated, in reliance on other executive branch actors' assurances;<sup>231</sup> sometimes the facts seem to be found implicitly by OLC;<sup>232</sup> sometimes OLC simply states that the President *could* reasonably find certain facts as

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229. See Sophia Brill, *A Modest Proposal for the New Travel Ban: Swear It Under Oath*, LAWFARE (Oct. 5, 2017, 10:30 AM), <https://www.lawfareblog.com/modest-proposal-new-travel-ban-swear-it-under-oath> [<https://perma.cc/LDY4-4WKL>] (“The first version of this order was issued just seven days after President Trump took office, and it banned travel . . . based on no fact-finding whatsoever. . . . [The] first order was not even reviewed by national security experts within the Department of Justice.”). Of course, because the internal process that order went through has not been made public, we cannot be certain what it entailed. But the face of the order itself also does not explain what facts supported the finding that the entry of these classes of aliens would be “detrimental to the interests of the United States.” See Exec. Order No. 13,769, § 5, 82 Fed. Reg. 8977 (Jan. 27, 2017).

230. See *supra* note 9.

231. See, e.g., Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 39 (July 16, 2010), <https://fas.org/irp/agency/doj/olc/aulaqi.pdf> [<https://perma.cc/NH95-K8KR>] (“[O]n the facts represented to us, a decision-maker could reasonably decide that the threat posed by al-Aulaqi’s activities to United States persons is ‘continued’ and ‘imminent.’”); Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, 26 Op. O.L.C. 1, 2 (Feb. 7, 2002) (“Based on the facts presented to us by DoD, we believe that the President has the factual basis on which to [make the relevant] conclu[sion].”).

232. See, e.g., April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, *supra* note 30, at \*21–22 (evaluating “several measures that had been taken to reduce the risk of escalation by Syria or Russia” and concluding that the targets selected reduced the “likelihood that Syria would retaliate” while deconfliction measures “reduced the possibility that Russia would respond militarily”); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Authority, Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee 38 (May 10, 2005), <https://www.justice.gov/olc/file/886271/download> [<https://perma.cc/8L9L-52K5>] (“We understand from [the CIA’s Office of Medical Services], and from our review of the literature on the physiology of sleep, that even very extended sleep deprivation does not cause physical pain, let alone severe physical pain.”); Compatibility of N.Y.C. Local Law 19 with Fed. Highway Act Competitive Bidding Requirements, 10 Op. O.L.C. 101, 106 (1986) (making implicit factual determination about effect of bidding processes on federal contract bidding).

predicates of authority without explaining whether the President has or has not actually found those facts, let alone based on what evidence;<sup>233</sup> and sometimes OLC concedes it does not have access to sufficient information to make a determination.<sup>234</sup> Meanwhile, OLC's "form and legality" review of executive orders does not appear to require any sort of rigorous review of the facts underlying the order.<sup>235</sup> Even less is publicly known about how OLC—or other executive branch legal decisionmakers—assess underlying factual predicates when giving *informal* legal advice that does not result in a published opinion or formal approval.<sup>236</sup> In short, although internal executive branch lawyers clearly take seriously their task of ensuring the President's exercises of power are legal, the facts to which they apply the law appear to be found without any clear, preset process.

The lack of formal process governing presidential factfinding does not necessarily mean that the President typically just makes facts up. Existing norms and practices within the executive branch surely do sometimes serve to ensure facts are found rigorously. For example, Daphna Renan has provided a rich account of how a "deliberative presidency" norm that includes "fact-intensive" review of decisions has taken root, particularly with respect to national security decisionmaking.<sup>237</sup> However, even where this norm appears most robust—in national security decisionmaking—it is still not clear what precise process is used to find underlying factual predicates for

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233. See *supra* note 194 (listing examples).

234. See, e.g., Applicability of 18 U.S.C. § 207(f) to Public Relations Activities Undertaken for a Foreign Corp. Controlled by a Foreign Gov't, 32 Op. O.L.C. 115, 119 (2008) ("We lack sufficient information to reach a conclusion about whether the foreign corporation at issue is a 'foreign entity' for purposes of 18 U.S.C. § 207(f)."); Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries, 22 Op. O.L.C. 251, 251 (1998) ("Because the information that you have provided does not allow us to determine the amount of the settlement that was intended to compensate the federal government for its claims[,] . . . we are unable to give any more specific guidance on this issue.").

235. See, e.g., Letter from Sally Yates, Acting Att'y Gen., U.S. Dep't of Justice (Jan. 30, 2017), <https://assets.documentcloud.org/documents/3438879/Letter-From-Sally-Yates.pdf> [<https://perma.cc/UL9K-VDLG>] ("OLC's review is limited to the narrow question of whether, in OLC's view, a proposed Executive Order is lawful on its face and properly drafted."). Again, this is not to say review of underlying facts never happens as part of this review, just that it does not appear to be formally *required* for sign-off.

236. See Erica Newland, *I Worked in the Justice Department. I Hope Its Lawyers Won't Give Trump an Alibi*, WASH. POST (Jan. 10, 2019), [https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8\\_story.html](https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html) [<https://perma.cc/6MRX-BQ9E>] (noting that sometimes OLC lawyers "wouldn't look closely at the claims the President was making about the state of the world").

237. See Renan, *supra* note 177, at 2223–30.

presidential exercises of power.<sup>238</sup> And one need not search far to find failures to abide by any sort of fact-checking norm, even with regard to highly consequential and publicly articulated facts in the national security domain.<sup>239</sup>

In short, even if there is a relatively robust norm for reviewing facts within the executive branch in certain instances, it is not clear precisely what that norm requires, which facts are subject to its review, which facts are excluded, or how consistently the norm is applied to the facts to which it ostensibly applies. Moreover, we know that the norm has failed to ensure adequate fact-checking in at least some instances where it would be thought to apply. Perhaps most fundamentally, the very fact that the internal practice for how facts are found is so unclear and untransparent should serve as cause for concern.

In sum, although some rigorous process is used to find facts in some instances, there does not appear to be a formal, preset process for how the President finds facts that serve as predicates for exercising presidential power. One might be tempted to conclude that this lack of formal process is unproblematic, because the President's accountability will sufficiently incentivize finding facts honestly and rigorously in each instance. However, this is simply not the case. Presidents are not primarily judged on their factfinding abilities but are instead judged on

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238. For example, as noted above, although an Obama administration Presidential Policy Directive called for the NSC Deputies Committee to ensure that "all papers to be discussed by the NSC . . . fairly and adequately set out the facts," PPD 1, *supra* note 221, at 4, it did not clearly set out how those facts must be found.

239. For example, as part of a rigorous, *ex ante* factual review of Secretary of State Colin Powell's infamous speech to the UN regarding whether Iraq had weapons of mass destruction, the CIA apparently removed reference to a claim that Iraq had tried to purchase uranium in Africa "because [it] d[idn]'t believe it," but it failed to remove the same factual claim from President Bush's subsequent State of the Union address because the CIA was never made aware that the claim would be mentioned. See MICHAEL MORELL & BILL HARLOW, *THE GREAT WAR OF OUR TIME: THE CIA'S FIGHT AGAINST TERRORISM—FROM AL QA'IDA TO ISIS* 95 (2015). Similarly, although the CIA carefully vetted talking points to be made to Congress shortly after the Benghazi attacks, it was unaware of the White House talking points National Security Advisor Susan Rice used on national television, which, unlike the CIA-approved talking points, "blam[ed] the Benghazi attack on [an anti-Muslim YouTube] video." *Id.* at 227–29. The first iteration of the Travel Ban provides another example of failure to abide by these norms in that it was issued without any apparent checking of the factual predicates thought to authorize the use of presidential power. See *supra* note 229.



other metrics,<sup>240</sup> and they will therefore often have incentives to skew factfinding in the service of these other metrics.<sup>241</sup>

Although political accountability could conceivably serve as a check on these impulses, it is unlikely to do so systematically, because voters are often unlikely to be able to (and will not necessarily want to) police faulty presidential factfinding.<sup>242</sup> Indeed, of all government decisions, factfinding might be the one that the general public is *least* able to police because of its relatively inferior access to information. This will be particularly true in the realm of foreign affairs and national security due to the secret and sensitive nature of the information.<sup>243</sup> Therefore, to the extent the theory is that the public will reliably hold the President accountable for erroneous factfinding and this will spur her to systematically find facts accurately, that empirical premise is questionable.<sup>244</sup> Indeed, even if the public could identify inaccurate factfinding, the notion that it would hold the President accountable for particular factfindings is not obvious. Much presidential factfinding will not be so politically salient as to merit punishment at the ballot box for false or arbitrary decisions.<sup>245</sup> And even if it is sufficiently salient,

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240. See, e.g., Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 854 (1999):

Broadly speaking, . . . most presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders. . . . For this they need power . . . . Whatever else presidents might want, they must at bottom be seekers of power.

241. See, e.g., Chesney, *supra* note 10, at 1413 (“Institutional incentive structures . . . might tend to incentivize inaccurate factfinding . . . .”); Rascoff, *supra* note 220, at 694–95 (noting the “well-known phenomenon of politicization of intelligence”).

242. For a terrific summary of existing critiques of accountability, see Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 187 n.6 (2014).

243. See, e.g., Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL Is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SEC. (Oct. 1, 2014), <https://www.justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure> [https://perma.cc/SBV2-AMUV]:

Our account has relied on the limited public record. Of course, if we are wrong about the facts, our legal analysis may change. What is hard about making a decisive assessment either way is that the party probably best able to assess these facts is the Administration and it has yet to make either its legal argument or its factual premises public.

244. Congress, too, might hold the President accountable for her factfinding, but again, there is little reason to think it will do so systematically or comprehensively.

245. See, e.g., Chesney, *supra* note 10, at 1430–31 (“[T]he issues [executive branch decisionmakers] resolve will vary . . . in terms of their transparency and salience in the public’s eye.”); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1981 (2015):

[T]o . . . allow large swathes of the administrative state to be taken over by a presidential administration subject only to the constraints of public opinion, would

voters can only vote for one person, requiring them to bundle their concerns in a way that raises difficulties for such an accountability dynamic.<sup>246</sup> Effective accountability in this context might also present normative downsides, by tempting the President to find facts that are not objectively true because she thinks the public *wants* those facts to be found, leading to less, not more, objective factfinding.<sup>247</sup> In short, it is simply not true that presidents have consistent, or sufficient, incentives to engage in objective factfinding underlying the use of presidential authority in a systematic or comprehensive way.<sup>248</sup>

Given that the President will not systematically have sufficient incentives to find facts objectively, the stakes should become clear. As this Article has sought to show, presidential factfinding is remarkably commonplace. Yet, there often appears to be *no* preset process for how the President finds facts that are predicates for exercising authority. And while we might be accustomed to the executive branch possessing enormous power these days, we generally accept that power in the hands of administrative agencies, because they are substantially constrained by the procedural strictures of the APA enforced by judicial review.<sup>249</sup> The President, on the other hand, is not subject to either of these constraints—her decisionmaking is not subject to the APA, and, as noted above, courts do not typically review presidential

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invite arbitrariness and oppression in a vast number of regulatory contexts that fly below the radar screen of media attention and public opinion.

246. See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHL.-KENT L. REV. 987, 997–98 (1997) (describing the “bundling problem” voters face because they must accept or reject all the President’s policies); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1160–61 (2010) (describing the difficulty of holding the President accountable given low-information voting, infrequency of elections, and breadth of issues).

247. Cf. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 689 (2000) (“[Politicians] are much more likely to consider how the facts appear to the general public than the way they look after disciplined and sustained investigation.”); Gersen & Stephenson, *supra* note 242, at 195, 198 (describing “pandering”); Kagan, *supra* note 123, at 2335 (“[M]odern Presidents are more often criticized for excessively hewing to, than for blithely disregarding, broad public opinion.”).

248. To be sure, *some* facts might be subject to such an accountability dynamic. The facts underlying the President’s decision to authorize the raid targeting Osama Bin Laden might be one example. See MORELL & HARLOW, *supra* note 239, at 143–76 (describing decisionmaking process regarding presidential approval of targeting Bin Laden and noting that Secretary of Defense Leon Panetta made “perhaps the strongest argument” for the strike by stating, “I’ve always operated by a simple test—what would the American people say?” . . . “There is no doubt in my mind that if they knew what we know—even with the range of confidence levels we have—that they would want us to go after the man responsible for all those deaths on 9/11.”). But there is little reason to think that these facts are the norm rather than the exception.

249. See, e.g., Stack, *Statutory*, *supra* note 17, at 591 (“[T]he Supreme Court’s tolerance of broad congressional delegations may be attributable, at least in part, to the greater procedural constraints imposed on statutory delegates.”).

factfinding.<sup>250</sup> As a result, at present, presidential factfinding appears largely unregulated both externally and internally. This raises serious risk that the President will be capable of (and, at times, incentivized to) find facts arbitrarily in order to exercise authority. Given the breadth and scope of presidential authority, a lack of procedures in this area thus raises a “particularly intolerable risk of arbitrariness.”<sup>251</sup>

Once we recognize this risk, we ought to consider how to constrain it. For this normative problem, this Section identifies a normatively desirable solution: constructing formal internal executive branch processes to help ensure, within reason, that factfinding is conducted deliberately and objectively, rather than unthinkingly or politically. This solution might also be thought of as one way of implementing the President’s positive constitutional duty to be honest and engage in reasonable inquiry in finding facts. Although a formal, preset process may not be constitutionally *required*, incorporating such a process to ensure objective factfinding occurs would serve as a means of ensuring the President is complying with this obligation.

Creating such a formal, preset process would “routinize” factfinding practices in a way that would (if the process is designed correctly) encourage objective factfinding.<sup>252</sup> Indeed, the notion that

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250. See *supra* note 17.

251. Bressman, *supra* note 151, at 524; see also Stack, *Statutory*, *supra* note 17, at 591 (“[B]ecause the president has more power than any given agency, the absence of procedural formality is more grave.”); cf. Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22–23 (1992) (“If the maxim that the only safe power is divided power is indeed a cultural norm, what would be taboo would be the creation of an organ of government at once omnipowered and omniscient.”); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 983 (1997) (“The President as lawmaker is more hazardous than [an agency head] as lawmaker, precisely because he is omniscient, remote from effective check by courts or even Congress.”).

252. See, e.g., Metzger, *supra* note 120, at 1924 (“[T]here are benefits to encouraging agencies to develop strong decisionmaking structures or to address key issues about the scope of their authority ahead of time.”); Rascoff, *supra* note 220, at 703 (“[A]s presidential intelligence becomes a matter of institutional habit within the White House, it will become increasingly difficult to operate outside of the internal processes that define it.”); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1870–71 (2012) (“[O]rganizational structures constrain and regularize agency decisions in the absence of direct oversight by either the political branches or the judiciary. This kind of intrinsic discipline is of critical importance because the bulk of agency activity takes place outside the glare of political or judicial spotlights.”); cf. W.H. REPORT, *supra* note 50, at i (“Decisions regarding war and peace are among the most important any President faces. It is critical, therefore, that such decisions are made pursuant to a policy and legal framework that affords clear guidance internally . . . [and] reduces the risk of an ill-considered decision.”); Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 734 (2013) (“Nations tend to obey international law, because their government bureaucracies adopt standard operating procedures and other internal mechanisms that foster default patterns of habitual compliance with international legal rules.”).

executive branch actors ought to set ex ante limits on their own discretion to limit arbitrary governance has long been a staple of administrative law scholarship and (for a time) doctrine.<sup>253</sup> Although the Supreme Court has held that such a requirement can only be imposed by Congress, not courts,<sup>254</sup> the basic reasoning underlying the idea is generally accepted.<sup>255</sup> The basic notion is that imposing ex ante procedures on the government's discretion helps prevent arbitrary governmental conduct and promotes good governance.<sup>256</sup> This reasoning has also formed the basis for critiques regarding the lack of process in how agencies and courts find legislative facts.<sup>257</sup> If this basic reasoning is correct, then providing ex ante procedures for presidential factfinding could also help promote good governance and prevent arbitrary

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253. One of the main concerns among administrative law scholars, such as K.C. Davis and Henry Friendly, was a lack of standards guiding agency discretion. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 55 (1969) (“When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time.”); *see also* Bressman, *supra* note 151, at 529–30 (“Davis and Friendly described the problem of arbitrary administrative decisionmaking as the lack of standards controlling the exercise of administrative authority.”). The proposed solution was to require agencies to supply the standards guiding and limiting their own discretion. Bressman, *supra* note 151, at 530.

254. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523–25, 548 (1978) (stating that nothing “permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*”); *see also* Bressman, *supra* note 151, at 532 (“The Court found illogical the notion that agencies possess the power to supply the standards that render their own statutory power constitutional.”); Sunstein & Vermeule, *supra* note 155, at 1971 (“[T]he Court [in *Vermont Yankee*] famously ruled that courts may not impose procedural requirements beyond those set out in the APA or other sources of positive law.”).

255. *Cf.* Sunstein & Vermeule, *supra* note 155, at 1938 (noting that concerns about lack of rule-bound discretion “continue to play a significant role” in administrative law even after *Whitman*).

256. *See, e.g.*, *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (“If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily.”), *rev'd and remanded sub nom. Whitman*, 531 U.S. 457; *see also* Bressman, *supra* note 151, at 532–33 (“[I]t is time for administrative law to come to grips with the concept of administrative standards. . . . [S]uch standards are necessary to improve the rationality, fairness, and predictability . . . of administrative decisionmaking.”).

257. *See, e.g.*, 1 DAVIS, *supra* note 12, § 6:38, at 618 (“When policy choices that affect private interest rest heavily upon factual ingredient, as many policy choices do, should a good legal system allow any lawmakers to proceed without responsibly marshaling the relevant facts stating them and analyzing them, and giving affected parties a chance to respond to them?”); FAIGMAN, *supra* note 12, at 181 (“[A]n informed empirical jurisprudence depends on the systematic use of procedural guidelines.”); Gorod, *supra* note 12, at 9 (“Given th[e] indeterminacy [of many legislative facts found by courts], it is problematic when such ‘facts’ are ‘found’ by ad hoc methods without the benefit of rigorous testing and then provide the basis for consequential legal decisions.”); *id.* at 73 (“Whatever the best procedures or guidelines might be, some procedures or guidelines should exist so that judges . . . do not simply engage in the ad hoc cherry-picking of facts . . . .” (footnote omitted)).

governmental conduct. In short, given the import of how the President finds facts, some sort of preset process seems desirable.<sup>258</sup>

But what should such a process look like? The, perhaps unsatisfying, answer is that “it’s complicated.” Constructing the “best” approach for presidential factfinding requires weighing extremely contestable costs and benefits that would require far more empirical and normative analysis than can be done in the space of this Section.<sup>259</sup> Accordingly, rather than seeking to propose the optimal method for how presidential factfinding ought to be constructed, I instead set forth a menu of feasible options for decisionmakers to consider, drawing largely from the administrative law and institutional design scholarship.<sup>260</sup> One approach would require interagency review of proposed findings of fact before they form the predicates for exercising power. This approach would have many benefits—including the virtue of aggregating information across the executive branch to better inform the relevant decisionmaking—but also costs, and therefore any such process would need to be carefully calibrated.<sup>261</sup> Interagency review could then be followed by a requirement that a high-level executive branch official

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258. Indeed, requiring *the President* to identify a preset process for finding facts would seem to be valuable in itself. While the President is not very good at personally conducting investigations to ferret out information and find facts, she might be quite good at creating *structures and processes* for how such information ought to be investigated and collected. Moreover, having the President create the process might force some responsibility onto her for such decisions. Cf. Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass’ns*, 87 CORNELL L. REV. 452, 461 (2002) (“[S]ome governmental actor [must] take responsibility for the hard choices of regulatory policy. Responsibility in this context means articulating the standards that direct and cabin administrative discretion.”).

259. See, e.g., Paul Quirk, *Presidential Competence*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 134, 143 (Michael Nelson ed., 10th ed. 2014) (“The effort to design the best possible organization for presidential coordination of the executive branch is exceedingly complex and uncertain—fundamentally, it’s a matter of hard trade-offs and guesses, not elegant solutions.”).

260. As in Part II, I focus here on identifying a process for presidential powers where individual due process concerns are not implicated. See *supra* note 122. Moreover, I primarily draw on administrative law scholarship that addresses how to prevent arbitrary governance rather than focusing on scholarship that addresses how to increase accountability since the President is, at least formally, accountable for her decisions, and, in any event, accountability-enhancing measures such as notice and comment procedures are unlikely to be adopted by the President.

261. On benefits, see, for example, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006) (“We do not want one supplier of information to the President; a competitive market better supplies clients than a monopolist.”); Rascoff, *supra* note 220, at 675–78 (noting benefits of information aggregation and harmonization); and Stephenson, *supra* note 11, at 1462–64. On costs, see, for example, Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1676–83 (2006) (discussing the benefits and costs of redundancy in institutional design); and Stephenson, *supra* note 11, at 1464–65 (noting the limits of Condorcet Jury Theorem and the collective action free-riding problems when many people are involved in the same decision). On calibration, see, for example, O’Connell, *supra*, at 1683–84.

sign off on the factfinding to ensure it was done objectively. The rationale, here, would be that putting the responsibility in the hands of one person would incentivize that person to ensure the facts were found reasonably.<sup>262</sup>

Another option would be to conduct ex post review of the factfinding, which could take the form of an analogue to “hard look” review. The reviewer could require the articulation of the factual underpinnings of the exercise of power and ensure that all the relevant evidence was considered and that there was a rational connection between the facts found and the evidence.<sup>263</sup> Although hard look review is typically done by courts, there is no reason it could not be conducted internally within the executive branch.<sup>264</sup> Such review could be bolstered by additional record-keeping and “reason-giving” requirements.<sup>265</sup> Indeed, simply requiring an internal record explicitly stating the facts that serve as predicates for the exercise of power and how they were found could be an improvement.<sup>266</sup> The President could also try to make factfinding decisions more transparent by making the process underlying factfinding more public or by requiring increased reporting of factfinding decisions to Congress or the public.<sup>267</sup> These options are just a sampling of prominent suggestions from the administrative law and institutional design literature regarding how best to structure executive branch decisionmaking. Surely, other possibilities exist,<sup>268</sup> but the hope of this Section is to provide a preliminary list of options to structure such decisionmaking.

Regardless of what the ideal structure for presidential factfinding is as a policy matter, factfinding review ought to be

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262. See, e.g., Short, *supra* note 252, at 1863–64.

263. Cf. *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

264. See, e.g., Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 758–59 (2006) (noting that variations of hard look review can be done through “non-judicial review of agency action, such as regulatory review by [OMB]”).

265. See, e.g., Short, *supra* note 252, at 1820–23 (discussing rationales behind reason-giving requirements); Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 741–42 (2014) (discussing record-building feature of hard look review).

266. Cf. Gorod, *supra* note 12, at 77 (“If courts were forced to identify expressly the legislative facts on which they have relied, it might increase the likelihood that judges would not rest their decisions on unfounded assumptions but instead would subject their assumptions to further research and testing . . .”).

267. There are well-known limits to transparency pushes, and they must be well-designed to be effective. See, e.g., Short, *supra* note 252, at 1846 (listing five characteristics of well-designed information-disclosure regulation).

268. For example, Matthew Stephenson has provided a methodical and sophisticated account of how institutional design mechanisms can spur increased information, which could also be incorporated into design of factfinding procedures. See Stephenson, *supra* note 11.

incorporated into existing *legal* review structures within the executive branch. As noted above, numerous existing structures within the executive branch seek to ensure that presidential authority is exercised legally, yet these structures do not appear to focus on ensuring that facts underlying the legal analysis were reasonably found.<sup>269</sup> Incorporating review of factfinding into legal review would help ensure that facts are found objectively and that the President abides by her obligations to be honest and engage in reasonable inquiry.

As a concrete example of what a preset process might look like, we can return to executive orders and proclamations. The order that governs how executive orders and proclamations are approved, E.O. 11030, could be amended to require that any factual findings that serve as predicates for authority of a proposed order be spelled out explicitly, in addition to the explanation of “the nature, purpose, background, and effect of” the proposed directive that is already required; that these factual findings be subject to interagency review; and that the Director of OMB review and sign off on the factfinding as having reasonably been conducted.<sup>270</sup> In addition, or as an alternative, the order could be amended to make clear that the requisite “form and legality” review must take into account the underlying factfinding—perhaps by requiring OLC to sign off on its having been done reasonably. After all, if my claim above is correct that the President has a constitutional duty to be honest and engage in reasonable inquiry in finding facts that serve as predicates for exercises of power, this should be part of “legality” review in any event. In short, it is not hard to envision a system where factfinding becomes a normal part of systematized executive branch review of presidential conduct.

Such review could apply rather straightforwardly to “Pure Fact” authorities, where the factual predicate is clearly stated.<sup>271</sup> For “Mixed Fact and Policy” powers, where the underlying factual premises are not clearly stated in the relevant authority, the governing order could require that the factual basis for the policy judgment be stated explicitly

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269. *See supra* notes 127, 231–235 and accompanying text.

270. *See supra* notes 225–226 and accompanying text (describing current formal order requirements). The order could also potentially require confidence assessments be given to the factual claims. *See infra* notes 297–298 and accompanying text (discussing incorporation of confidence assessments into intelligence products and how such assessments could be incorporated into presidential factfinding).

271. For example, if the President wished to certify that the Palestinian Authority has not “taken any action with respect to the ICC that is intended to influence a determination . . . to initiate a judicially authorized investigation,” Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 7041(l)(2), 131 Stat. 135, 667, this finding could be subject to interagency review and high-level sign-off before the President would make it.

(at least internally) and that this factual basis be subject to interagency review and high-level sign-off. So, for example, if a proposed order sought to ban the entry of certain aliens because their entry would be “detrimental to the interests of the United States,” then at least the internal paperwork would need to explain precisely why the aliens’ entry would be “detrimental,” and those factual predicates would be subject to interagency review and high-level sign-off.<sup>272</sup>

This is not to suggest that there only be one process for all instances of presidential factfinding. Given the range of areas in which the President must find facts, one could imagine different processes and methods of review depending on the substantive issue area—for example, one process for national security, one for trade, one for sanctions, one for government procurement, and so on. Similarly, one could divide up presidential factfinding authorities based on the *type* of fact the President must find.<sup>273</sup> At bottom, though, whether a one-size-fits-all approach, a more nuanced substantive approach, a fact-type approach, or some other approach is optimal, the President ought to identify procedures for factfinding *ex ante* to avoid conducting factfinding in an ad hoc manner that increases the risk of arbitrary and illegitimate exercises of power.<sup>274</sup> Of course, such formal preset procedures would not eliminate the President’s ability to manipulate the outcome or avoid the process entirely.<sup>275</sup> But having default formal processes in place is likely to have a constraining effect by their simple *de facto* presence, which would create internal routines and structures that would require extra effort to avoid.<sup>276</sup>

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272. Perhaps the relevant factual findings would have confidence levels assigned to them, as well. *See supra* note 270.

273. For example, facts might be assessed based on how *verifiable* and *important* they are, with more process justified as one moves from unverifiable to verifiable and from unimportant to important. *Cf.* 3 DAVIS, *supra* note 12, § 15:3, at 145 (suggesting adjudicative facts deserve more process, in part, because they are more ascertainable); *id.* § 12:8, at 437 (providing five scales along which legislative facts can be assessed). How best to define “verifiability” and “importance” would no doubt be contestable and surely there are other potentially useful metrics. The point is that decisionmakers could evaluate particular factfinding powers on predetermined metrics to see where to appropriately allocate resources. That said, while a fact-type approach would be more nuanced, it would also provide less clear guidance *ex ante* and allow more room for error or manipulation than a more broadly applicable default process.

274. *Cf.* Gorod, *supra* note 12, at 73–74 (“Whatever the best procedures or guidelines might be, some procedures or guidelines should exist . . . .” (footnote omitted)).

275. *See, e.g.,* HUGHES, *supra* note 109, at 24, 26 (noting that policymakers often cherry-pick intelligence or use it to support preexisting positions); MAYER, *supra* note 223, at 60–61 (stating that executive orders sometimes skip formal processes when the White House is under time pressure).

276. *See supra* note 252; *see also* Katyal, *supra* note 261, at 2318 (“[M]odest internal checks . . . , while subject to presidential override, could constrain presidential adventurism on a day-to-day basis.”); *cf.* Bruff, *supra* note 10, at 60 (“Although administrative officials ordinarily are



To be sure, such preset process would come with costs. Requiring formal process would make factfinding more burdensome, which could make it harder for the President to exercise authorities predicated on factfinding. This is analogous to the critiques made in the administrative law literature that increased procedural requirements lead to ossification.<sup>277</sup> These costs must be taken seriously. However, to understand whether the costs outweigh the benefits, we need to know more about what precisely these costs are.<sup>278</sup> And it is worth recalling that the alternative to having *some* preset process, is having *no* preset process.<sup>279</sup> Such a lack of process might be justifiable if one believes the risks of arbitrary factfinding are minimal, but not if one perceives the risks as substantial.<sup>280</sup> Moreover, even if costs are a primary concern, they might be addressed through design of the process, rather than by eliminating the process entirely. For example, if the concern is that imposing a preset process on routine, unimportant presidential factfinding is too onerous, one could impose a “significance” threshold that must be met before subjecting the factfinding to the process.<sup>281</sup> If the concern is that a preset process could slow an extremely significant and necessary response to a disaster, one could provide exceptions for

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prepared to judge both the facts and the law in a fashion that is sympathetic to known presidential desires, there are limits to what they will approve.”); Linde, *supra* note 123, at 253 (“[Procedural design of lawmaking need not] presuppose philosopher kings elected by philosopher constituents, free from ignorance, sloth, gluttony, avarice, short-sightedness, political cowardice and ambition; quite the contrary. It undertakes to confine political irrationality by process, not what Learned Hand called ‘moral adjurations.’”); Catherine M. Sharkey, State Farm “*With Teeth*”: *Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1652 (2014):

Expecting analysis to win a head-to-head battle with politics goes too far. Ensuring evidence-based decision-making subject to oversight, however, remains an effective prophylaxis against wanton political decision-making in the bureaucracy. While the specter of political manipulation cannot be ignored . . . the requisite agency findings, with sufficient evidentiary backing, should stymie at least purely ideological decisions.

277. See, e.g., Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012). *But see*, e.g., Sharkey, *supra* note 276, at 1654 (“[T]he ossification critique is not built on strong empirical foundations.”).

278. See Stephenson, *supra* note 264, at 803 (noting that it matters whether costs are socially important or unimportant).

279. *Cf.* Sharkey, *supra* note 276, at 1650 (“[T]he fact-finding burden—even if significant—is put into perspective when one considers the alternative, namely decisions justified by the agency’s say-so.”).

280. *Cf.*, e.g., Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 675 (2015) (discussing balancing costs of process against benefits of governance).

281. Constructing the appropriate “significance” threshold would no doubt be complex, but such thresholds have been constructed before. For example, only regulations that meet a defined “significance” threshold must go through centralized OMB review, a determination made routinely within the executive branch. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(f) (Sept. 30, 1993) (defining “significant regulatory action” as an action that, inter alia, would have an annual effect on the economy of \$100 million or more).

emergencies.<sup>282</sup> In short, to the extent there are costs in implementing a preset process—and surely there are—they might be addressed in identifying *which* process is best, rather than in arguing for no process at all. Indeed, one of the virtues of regulating factfinding through internal executive controls is that such controls can be modified relatively easily by the President in light of additional information regarding their costs (or benefits).

An additional objection to this endeavor is that it is fruitless, because the President has no reason to impose such a process on herself. Yet presidents limit their own authority through *ex ante* processes all the time.<sup>283</sup> Of course, they must have some incentive to do so, but it is not hard to conjure such an incentive in this context. If a President wishes to ensure that her factfinding is done objectively—perhaps in response to a previous administration’s rampant disregard for factfinding or a particularly high-profile factfinding error—then she might have the incentive to impose such a structure and announce it publicly. Although this might not happen in the immediate future, it does not strike me as unrealistic, and it only becomes more realistic the more such a process is discussed and lauded.

In short, although it is difficult to construct the perfect process for the President to conduct factfinding, there is good reason to think that *some* *ex ante* process is desirable. Given the breadth and import of presidential factfinding authorities, how the President finds facts is too important to leave to the whim of the moment.

## 2. Certainty

The next area of inquiry is into what standard of certainty the President ought to apply to factfinding. We generally have no idea how certain the President must be before she finds a fact authorizing her to exert power. This is not to say that the President does not apply a standard of certainty. To the contrary, it is logically necessary for her to do so. As Gary Lawson has stated, “For any given proposition in any

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282. Cf. Bruff, *supra* note 10, at 58 (“Because orderly bureaucratic procedure takes time, any legal prerequisites to presidential decision must allow for response to emergencies. There are times when the President needs to exercise his statutory powers on very short notice.”).

283. See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 433 (2009) (“Presidents frequently support imposition of internal mechanisms that substantially constrain the Executive Branch and even sometimes adopt such measures voluntarily . . .”); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801 (2011) (evaluating instances where the executive branch, including the President, relinquished control through institutional redesign, and discussing why might be incentivized to do so).

given context, one needs a *standard of proof* that expresses the total weight or magnitude of the evidence required for a justified assertion of that proposition.”<sup>284</sup> The choice is thus not between having a standard of certainty and not having one, it is between *identifying* a standard of certainty and not identifying one. To date, with very limited exception, the President has failed to do so.<sup>285</sup>

Once we recognize this state of affairs, it seems fairly easy to critique it. We know from many areas of law that the standard of certainty factfinders apply can be dispositive of whether or not they find relevant facts.<sup>286</sup> This is fairly intuitive. If the President only needs to determine, for example, that she has “reasonable suspicion” that use of force will preserve “regional stability” before using military force, then she has vastly more discretion than if she needs to determine that she is “nearly certain” that this is the case. Choosing the appropriate level of certainty can thus be determinative of whether the authority in question can be used. Indeed, identifying the standard of certainty is perhaps particularly important in the presidential factfinding context given the coordination within the executive branch that must take place for the President to find facts.<sup>287</sup>

The applicable standard of certainty is thus undoubtedly important. So, what should it be? The literature on how to identify optimal standards of certainty is immense.<sup>288</sup> The conventional approach is to calculate the costs of false positives and false negatives and derive the standard of certainty from there.<sup>289</sup> The basic intuition

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284. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 870 (1992) (“[S]ome standard of proof—whether cardinal or ordinal, explicit or implicit—*must* be operative, or no conclusion, including ‘I don’t know,’ can rationally be advanced.”); cf. Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 558 (2013).

285. I am only aware of one instance in which the President has publicly identified a standard of certainty, and that is President Obama’s release of a report explaining that a “near certainty” standard applied to certain targeted-killing determinations. W.H. REPORT, *supra* note 50, at 25.

286. See, e.g., Kevin M. Clermont, *Trial by Traditional Probability, Relative Plausibility, or Belief Function?*, 66 CASE W. RES. L. REV. 353, 354 (2015) (“The different standards of proof determine outcome. Empirical proof supports that point . . . .”); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 741 (2012) (“The stringency of the proof burden determines how error is allocated . . . .”).

287. Failure to identify the appropriate standard will affect both what sorts of information will be collected by executive branch actors and the ability of anyone to effectively review the factfinding. Cf. Matthew C. Stephenson, *Evidentiary Standards and Information Acquisition in Public Law*, 10 AM. L. & ECON. REV. 351 (2008) (stating that setting an evidentiary standard can affect incentives to acquire information).

288. See, e.g., Allen & Stein, *supra* note 284, at 559–60 (collecting sources); Mark Spottswood, *The Hidden Structure of Fact-Finding*, 64 CASE W. RES. L. REV. 131, 143–52 (2013) (same).

289. See, e.g., John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1071 (1968); Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621, 622 (1998) (“The now conventional understanding of the burden of proof is that the level

is that the higher the cost of false positives relative to the cost of false negatives, the higher the standard of certainty should be.<sup>290</sup> How precisely the calculation should be conducted is subject to rigorous debate.<sup>291</sup> In fact, this probabilistic method has itself come under sustained critique by scholars who argue that people find facts not through probabilistic models but by constructing and comparing “stories” or “narratives.”<sup>292</sup> Given the complex nature of these questions, identifying the optimal standard must lie outside the scope of this Section. The point, for now, is to establish that this is a fruitful line of inquiry. Standards of certainty matter, and it is remarkable that we do not know what the President’s standards of certainty are or should be for finding facts.

Some might argue that identifying standards of certainty should be done on an ad hoc basis in the context of particular decisions rather than ex ante. Although one cannot reject this claim categorically, such an approach risks losing the benefits of ex ante processes noted above and playing into general risks of politicized or emergency factfinding and their attendant biases.<sup>293</sup> And in any event, even if some authorities may call for ad hoc certainty standards, surely many will not.<sup>294</sup>

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or weight of the burden of persuasion is determined by the expected utilities associated with correct and incorrect alternative decisions.”); *see also In re Winship*, 397 U.S. 358, 370–71 (1970) (Harlan, J., concurring):

If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

290. For example, this explains the higher standard for guilty verdicts in criminal proceedings (beyond a reasonable doubt) than for civil verdicts (preponderance of the evidence). The cost of a false positive (convicting an innocent person) is thought to be substantially higher than the cost of a false negative (acquitting a guilty person) in the criminal context but not so in the civil context.

291. *See, e.g.*, Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254 (2013) (refining existing formulas); Kaplow, *supra* note 286; Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 2–3 (2010) (critiquing the conventional formula and proposing a new one).

292. *See, e.g.*, Allen & Stein, *supra* note 284, at 570; Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 224 (2008) (“In this essay, we attempt to . . . demonstrate that the process of inference to the best explanation itself best explains both the macro-structure of proof at trial and the micro-level issues regarding the relevance and value of particular items of evidence.”).

293. *See* Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 908 (2004) (“In times of crisis, government actors can err by misperceiving that certain groups pose a danger or by acting on the erroneous perceptions of others.”).

294. *Cf.* Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1090–91 (2009) (rejecting ad hoc approach for litigation).

Although the difficulty in constructing a standard of certainty might lead some to wonder if the game is worth the candle,<sup>295</sup> it is worth remembering that the President is *already* applying a standard of certainty when he finds facts.<sup>296</sup> It is just not clear (perhaps, even to him) what it is.

If identifying definitive standards of certainty is too onerous, another possibility would be to require stated *levels of confidence* regarding the President's factual determinations. This would mirror reforms implemented in the intelligence community following the intelligence failures leading to the Iraq War.<sup>297</sup> One of the key recommendations made by the Iraq Review Group was that "in all future major intelligence products, analysts be required to include a thorough assessment and explicit statement regarding their level of confidence in the judgments expressed."<sup>298</sup> It is not clear why this innovation should be limited to intelligence products. Thus, even if the President does not wish to identify preset standards of certainty, she might still require internal statements of levels of confidence, which would give her more information and likely have the effect of disciplining, or at least clarifying, internal decisionmaking.

### *B. Congressional Regulation of Presidential Factfinding*

Congress could also seek to regulate presidential factfinding procedurally. Congress already does this sometimes when it confers factfinding power on the President. At times, Congress requires the President to notify Congress or certain committees of the President's determination,<sup>299</sup> to compile and submit a factual record or the

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295. *Cf. Vars, supra* note 291, at 3 ("One might throw up one's hands at this point, but that would be a mistake. Courts and legislators must select standards under conditions of imperfect information, and the outcomes of real cases hang in the balance.").

296. *See supra* note 284 and accompanying text.

297. *See MORELL & HARLOW, supra* note 239, at 102:

[B]y far the biggest mistake made by the analysts . . . was not that they came to the wrong conclusion about Iraq's WMD program, but rather that they did not rigorously ask themselves how confident they were in those judgments. . . . [H]ad the analysts at the time thoughtfully and rigorously asked themselves how confident they were . . . they would most likely have said, "Not very." That would have been a very different message to the president and other policymakers and potentially could have affected their policy decision.

298. *Id.* at 103.

299. *See, e.g.*, 14 U.S.C. § 665(b) (2012) (prohibition on shipbuilding in foreign yards can be waived by a presidential determination that must be transmitted to Congress thirty days prior to taking effect); 21 U.S.C. § 1903(g)(2) (2012) ("When the President determines not to apply sanctions that are authorized by this chapter to any significant foreign narcotics trafficker, the President shall notify the [relevant congressional committees] not later than 21 days after making

underlying reasons for the determination,<sup>300</sup> or to publish the finding in the Federal Register or through executive order or proclamation.<sup>301</sup> Some authorities also require that the President either consult with certain actors or consider certain factors in making the relevant determination.<sup>302</sup> If it wished, Congress could bolster such procedural requirements by adding more requirements to particular authorities or by passing a framework statute governing presidential factfinding in general. However, to determine the appropriate approach for how

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such determination.”); 22 U.S.C. § 6301(f)(2) (2012) (“If the President decides to exercise the waiver authority [regarding sanctions], the President shall so notify the Congress not less than 20 days before the waiver takes effect.”); 22 U.S.C.A. § 9524(c) (West 2019) (stating that certain sanctions can be waived only if the President submits particular determinations to relevant congressional committees).

300. For example, see 15 U.S.C. § 713d-1(a) (2012), which states that when President determines there is critical shortage of certain materials or products that “jeopardizes the health or safety of the people of the United States or its national security or welfare,” he may propose conservation measures of such materials or products, “which he shall submit to the Congress in the following form:” including “[a] statement of the circumstances which, in the President’s judgment, require the proposed conservation measures” and “[a] complete record of the factual evidence upon which his recommendations are based, including all information provided by any agency of the Federal Government which may have been made available to him in the course of his consideration of the matter.” See also, e.g., 16 U.S.C. § 824o-1 (2012) (stating that when the President provides a particular directive identifying a “grid security emergency,” he shall inform the relevant congressional committees of “the contents of, and justification for, such directive or determination”); 22 U.S.C. § 6301(f)(2) (stating that notification to Congress of sanctions waiver “shall include a report fully articulating the rationale and circumstances which led the President to exercise the waiver authority”).

301. See, e.g., 22 U.S.C. § 2459(a) (2012) (requiring notice of presidential determination that cultural artifacts are of “cultural significance” and removed from judicial jurisdiction be published in Federal Register); 26 U.S.C. § 993(c)(3) (2012) (“If the President determines that the supply of any [export] property described in paragraph (1) is insufficient to meet the requirements of the domestic economy, he may by Executive order designate the property as in short supply.”); 41 U.S.C. § 6305 (2012) (“Each determination of need by the President under this subparagraph shall be published in the Federal Register.”); see also 21 U.S.C. § 1903(b) (2012) (requiring annual report to certain congressional committees “identifying publicly the foreign persons that the President determines are appropriate for sanctions pursuant to this chapter”).

302. See, e.g., 19 U.S.C. § 1981(c)(1)(A) (2012) (“Any increase in, or imposition of, any duty . . . may be reduced or terminated by the President when he determines, after taking into account the advice received from the United States International Trade Commission . . . and after seeking advice of the Secretary of Commerce and the Secretary of Labor, that such reduction or termination is in the national interest.”); 50 U.S.C. § 4611 (2012) (“The President . . . shall apply sanctions . . . if the President determines that [a foreign person’s violation of export controls] . . . has resulted in substantial enhancement of Soviet and East bloc [military] capabilities . . . as determined by the President, on the advice of the National Security Council, to represent a serious adverse impact on the strategic balance of forces.”); 12 U.S.C. § 1706c(a) (2012) (providing that an agency can increase mortgage insurance if the President determines the increase to be in the “public interest” after “taking into account the general effect of any such increase upon conditions in the building industry and upon the national economy”); 22 U.S.C. § 2151t(b) (2012) (“In making loans” to promote the economic development of certain countries, “the President shall consider the economic circumstances of the borrower and other relevant factors, including the capacity of the recipient country to repay the loan at a reasonable rate of interest . . .”).

Congress ought to regulate factfinding, we would need a more comprehensive and detailed analysis of precisely when and how Congress currently regulates presidential factfinding, as well as an assessment of the constitutional issues raised by Congress's regulation of internal executive branch decisionmaking delegated to the President.<sup>303</sup> Given the complexity of these questions, a fuller elaboration of how Congress currently does and ought to regulate presidential factfinding will have to wait for another day.

### *C. Judicial Review of Presidential Factfinding*

The next question is how judicial review of presidential factfinding ought to be structured. Before discussing this issue, it is worth emphasizing the inherent limits of judicial review as a method of policing presidential factfinding. Because so many exercises of presidential factfinding will not impact individuals in a way that confers standing, a great deal of presidential factfinding will not be regulated by judicial review.<sup>304</sup> Thus, judicial review alone will never be a fully satisfying method of regulating presidential factfinding. That said, there will be times when exercises of factfinding authority are subject to judicial review, and such review is thus a key part of the enforcement regime.

Constructing appropriate judicial review in the context of presidential factfinding is a difficult enterprise. Judicial review is meant to ensure that the President is complying with the law—here, to honestly and reasonably find facts—but courts are understandably wary of substituting their judgment for the President's given the President's perceived institutional advantages.<sup>305</sup> An appropriate mode of judicial review will seek to balance these competing considerations.

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303. *Cf.* *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); Bruff, *supra* note 10, at 23–24 (suggesting that applying the APA to the President would raise constitutional concerns); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1223 (2013) (noting the Court's reluctance to find that statutes regulate the President "in view of the resulting constitutional questions about executive power"). Indeed, even if Congress's regulation of statutory factfinding is unproblematic—as it may well be—regulation of the President's constitutional factfinding powers would raise thornier issues.

304. *See supra* note 17.

305. As discussed in Part II, I focus here on ensuring the President abides by her first-order obligations, separate and apart from what individual rights might require in particular instances. *See supra* note 122.

Courts typically defer to presidential authority because of the President's relative accountability and epistemic advantages.<sup>306</sup> However, neither of these comparative institutional advantages ought to be assumed to be present in the context of presidential factfinding. Although the President is, of course, more directly accountable than judges, it is not clear that she is accountable for her *factfinding*. As noted above, the public will have a uniquely hard time holding the President accountable for factfinding, and even if it could hold the President accountable, it is not clear we would want the President to find facts based on how popular they might be.<sup>307</sup> For these reasons, it is important to be careful before deferring to presidential factfinding authorities on accountability grounds. That said, there might be some decisions predicated on factfinding that are sufficiently important that we would want the President to make them based on an accountability rationale. Factfinding authorities for use of force, for example, might be justified on this ground. So, while caution should be used before deferring to presidential factfinding on an accountability rationale, one cannot entirely rule it out.

The next rationale for judicial deference to presidential factfinding is based on the President's relative epistemic advantages over courts. The President surely has access to more information than judges and thus has the capacity to find facts more accurately than courts.<sup>308</sup> But as noted above, just because the President has access to information within the executive branch does not mean that she will always be motivated to use it to objectively find facts.<sup>309</sup> Indeed, greater access to information also creates the ability to better cherry-pick information to arrive at a preordained outcome.<sup>310</sup>

In short, although the President is more directly politically accountable than the courts, she will not necessarily be accountable for her factfinding. And although the President has the *capacity* for epistemic advantage, she will not always use that capacity. This calls for caution before courts defer based on these rationales. That said, there may be situations where accountability and epistemic advantages justify deference to exercises of presidential factfinding powers. The key

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306. See, e.g., Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 479 (2013); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078–90 (2008); cf. Chesney, *supra* note 10, at 1434–35.

307. See *supra* notes 240–248 and accompanying text.

308. See generally Sunstein, *supra* note 163.

309. See *supra* notes 240–248 and accompanying text.

310. Cf. WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 103 (2003) (suggesting that because presidents have better access to information, they “can tailor their presentation of facts in ways that strengthen their position”).



is balancing the need for judicial review with the need to appropriately defer to the President in such instances. Below, I propose three potential approaches that seek to balance these concerns in different ways: *process-based deference*, *hard look review*, and *contextual deference*. I explain each approach's benefits and costs and conclude with the preliminary suggestion that process-based deference is likely the most realistic, desirable starting point.<sup>311</sup>

### 1. Process-Based Deference

The first potential approach to judicial review would be a form of process-based deference.<sup>312</sup> Under this approach, courts would increase deference to the relevant factfinding when the President establishes that she used rigorous, internal executive process to find facts and decrease deference when she has not.<sup>313</sup> This could be done, for example, by “requiring the executive branch to provide an express account of the decisionmaking process that produced the factual judgment.”<sup>314</sup>

The basic intuition behind this form of judicial review is clear.<sup>315</sup> By increasing deference when the President establishes the factfinding was conducted using a rigorous internal process and ratcheting down

311. This Section addresses how courts ought to review presidential factfinding that is subject to judicial review but brackets many technical questions about how such review might come about or what remedies might be available. For an interesting account of how to deal with some of the key threshold, standard of review, and remedies questions in judicial review of presidential orders, more broadly, see Manheim & Watts, *supra* note 17 (manuscript at 61–86).

312. The term “deference” is famously slippery. Horwitz, *supra* note 306, at 1072. Here, I adopt Paul Horwitz’s definition that “deference involves a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently.” *Id.*

313. Such an approach has been called for by several scholars in a range of areas. See, e.g., Berger, *supra* note 306, at 498, 505; Chesney, *supra* note 10, at 1419; Larsen, *supra* note 12, at 182, 234–35 (suggesting approach whereby “courts are tasked with evaluating the process used to generate the factual claims presented” and the “more complete the process behind the factual statement, the greater deference should be due”); Renan, *supra* note 177, at 2256–62 (suggesting “indirect enforcement” of presidential norms could be implemented by ratcheting down deference when the President has not abided by the “deliberative presidency” norm); Sharkey, *supra* note 276, at 1592; see also Manheim & Watts, *supra* note 17 (manuscript at 57) (“As a practical matter, . . . the lack of procedural constraints governing the issuance of presidential orders—and, in particular, a President’s decision to dispense with intra-executive processes, such as internal legal review—may well encourage a court to review the substance of a presidential order with a more skeptical eye.”). This approach also seemed to underlie the Supreme Court’s ruling in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and has analogues in administrative law, where more process often garners agencies more deference. See, e.g., Larsen, *supra* note 12, at 234–40.

314. Chesney, *supra* note 10, at 1419.

315. Cf. Horwitz, *supra* note 306, at 1101 (“[T]o the extent that judicial deference . . . is based on [an institution’s] epistemic superiority, we should oblige such an institution to actually bring the weight of its expertise to bear on the problem before the court.”).

deference when it was not, this form of review would incentivize the President to use more rigorous process *ex ante*, thereby taking advantage of her epistemic advantages. Of course, such an approach is no panacea. The executive branch would have incentives to paint its internal process in the most favorable light,<sup>316</sup> and the President could still reach an inaccurate result even after using a rigorous process. But by incentivizing a more rigorous process, process-based review would likely encourage more accurate factfinding in the mine run of cases.<sup>317</sup> Moreover, courts are quite practiced in examining process—at least relative to examining substantive policy decisions—and thus such review would not seem to lie outside realistic judicial competence.<sup>318</sup> Finally, it is worth noting that deference in this context need not be “absolute.”<sup>319</sup> The court might only defer “up to a point,” but still be willing to respect presidential findings of fact that the court would not have made on its own.<sup>320</sup>

In short, a process-based deference approach would help incentivize the President to use her epistemic advantages in finding facts, while avoiding strict scrutiny of the ultimate policy or factual determination that the investigation enabled.

## 2. Hard Look Review

Another approach would be to apply a variant of administrative law’s “hard look” review to presidential factfinding.<sup>321</sup> Although hard look review currently only applies to *agency* decisionmaking, several scholars have argued it should apply to presidential decisionmaking in

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316. See Chesney, *supra* note 10, at 1419 (recognizing that the benefits of this form of judicial review “should not be overstated” and that executive branch “[d]eclarations no doubt would cast underlying decisionmaking processes in the best possible light, perhaps at substantial variance with events as they actually unfolded on the ground”).

317. This approach might complement Kevin Stack’s proposal that presidential determinations, including factual determinations, forming the predicate of exercises of statutory authority ought to be subject to *ultra vires* review. Stack, *Reviewability*, *supra* note 10, at 1201–02. Stack clarifies that such review ought to be deferential but does not specify what deference ought to apply. *Id.* at 1207. Process-based deference would be one option.

318. See, e.g., 3 DAVIS, *supra* note 12, § 29:17, at 407–09; Larsen, *supra* note 12, at 237 (noting that “judges are good at evaluating process” and that this type of review “is not that far afield from other questions that are part of the judicial homework already”).

319. See, e.g., Horwitz, *supra* note 306, at 1073.

320. *Id.* At which “point” to draw the line, of course, could be highly contestable. Cf. Larsen, *supra* note 12, at 202–18, 235 (providing examples of “alternative facts” that are “easily rebutted” or “simply untrue”).

321. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983)

certain contexts.<sup>322</sup> Hard look review could be translated to the context of presidential factfinding by perhaps requiring that the President clearly state the factual findings underpinning her exercise of power, establish that she considered all the relevant evidence, and articulate a rational connection between the ultimate factual finding and that evidence.<sup>323</sup>

The benefits of hard look review are fairly well known: It would incentivize the President to ensure the process underlying the factfinding was reasonably constructed and considered the relevant information.<sup>324</sup> It would impose greater scrutiny than process-based deference, in that it would require a formal articulation of the connection between the ultimate determination and the evidence and would include some substantive review of the ultimate determination to ensure it was rationally connected to the underlying evidence.<sup>325</sup> Moreover, by requiring an articulation of the basis of the decision, it would also increase the chance that the public could hold the President accountable for particular determinations.<sup>326</sup> Hard look review would also, however, have well-known costs. Critics often point to hard look review's potential to "ossify" policymaking and argue that it can raise separation of powers and judicial competence problems by permitting inexpert judges to substitute their judgment for that of expert executive branch officials.<sup>327</sup> These critiques have their conventional responses in

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322. See, e.g., Driesen, *supra* note 10, at 1066 (arguing that extending arbitrary and capricious review to statutory presidential policymaking "supports the rule of law and serves constitutional values"); Masur, *supra* note 10, at 492 (arguing that "[n]o principled line exists to confine hard look review to the domain of administrative agencies"); cf. Manheim & Watts, *supra* note 17 (manuscript at 76) (calling for a more deferential form of "arbitrariness" review, pursuant to which "the President would be required to set forth a non-arbitrary justification in the text of his orders themselves" and a court would uphold the order "so long as the decisional factors that the President relied upon were not legally foreclosed" and "any factual justifications had adequate support").

323. Cf. Driesen, *supra* note 10, at 1060 ("Arbitrary and capricious review of presidential decisionmaking should aim to detect evasion of the legislative purpose" by requiring "some factual support for a decision and a rationale linking the decision to the statutory policies.").

324. See *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) ("The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.").

325. Of course, how rigorous hard look review is and ought to be is a matter of debate. See, e.g., Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1360 (2016) (arguing for "thin" rationality review both descriptively and prescriptively).

326. See Bruff, *supra* note 10, at 59 ("[F]rom the standpoint of the President's political accountability to Congress and the public, a requirement that he reveal his rationale for a decision clearly is preferable to a system that would allow him to select an option without explanation, leaving all concerned to speculate on the reasons for it.").

327. See, e.g., Sitaraman, *supra* note 154, at 501–05 (noting critiques of hard look review).

the administrative law literature as well.<sup>328</sup> Where one comes out on the normative desirability of such review will thus depend on how one balances these and other potential benefits and costs.

### 3. Contextual Deference

Another way to structure judicial review of presidential factfinding is more ad hoc. Rather than a one-size-fits-all form of review, this approach would seek to evaluate each individual exercise of authority to determine whether the reasons typically thought to justify deference are present and to calibrate deference accordingly. The basic logic underlying this contextual approach is that judicial deference ought to be constructed in a nuanced way to harmonize the reasons warranting deference and the function of judicial review.<sup>329</sup>

Applying this approach to presidential factfinding means that deference would be calibrated on several dimensions. First, the reviewing court would evaluate whether the factfinding at issue is likely to be legitimately premised on an epistemic or accountability rationale. If so, deference would increase on this metric; if not, it would decrease. In particular, the court might evaluate the *type* of factfinding authority at issue to see if it is likely to be subject to epistemic or accountability advantages. This evaluation might lead the court to, for example, provide less deference for facts that are more verifiable and more deference for facts that are less verifiable.<sup>330</sup> On this account, retrospective facts might, on balance, receive less deference, because they are typically more verifiable and less likely to be subject to epistemic or accountability advantages, whereas prospective facts might receive more deference, because they are typically less verifiable and more likely to be infused with policy judgments reliant on epistemic and accountability advantages.<sup>331</sup> Assessing fact types would be more

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328. See, e.g., *id.* at 506 (summarizing debate). In this context, ossification might be of less concern than in the administrative law context because costly notice and comment proceedings would not be implemented or enforced. Cf. *id.* at 527–28 (noting that not requiring notice and comment procedures can mitigate ossification concerns).

329. See, e.g., Araiza, *supra* note 28, at 930, 957 (suggesting such an approach for deference to congressional factfinding); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029 (2011) (suggesting approach for review of agency action in constitutional cases); Chesney, *supra* note 10, at 1430 (suggesting a similar approach for national security fact deference).

330. See, e.g., Araiza, *supra* note 28, at 908–09 (suggesting that “evaluative facts” that are less verifiable than “empirical facts” call for greater judicial deference).

331. See Araiza, *supra* note 28, at 908–09; Chesney, *supra* note 10, at 1410, 1430. Similarly, on balance, facts relating to past conduct of particular individuals would receive less deference than facts relating to general phenomena in the world, as specific, individualized facts are more

straightforward for Pure Fact powers and Mixed Fact and Policy powers where the factual predicates are clearly laid out, but where the factual underpinnings of Mixed Fact and Policy powers are hard to separate from the policy judgment, more deference would likely be justified.<sup>332</sup> Finally, the reviewing court might also evaluate the substantive issue to determine if there is some additional reason to defer to the President (perhaps because a core exclusive authority was at issue) or to avoid deference (perhaps because of pathologies suggesting the President would be unlikely to find facts objectively in the relevant context).<sup>333</sup> These sliding deference scales would serve as rules of thumb—the general idea being that the court would evaluate each exercise of a factfinding authority on these different dimensions and carefully calibrate deference appropriately.<sup>334</sup>

This approach has the benefit of being the most nuanced. But this virtue is also its vice. The complexity of the inquiry raises significant concerns about whether courts could effectively conduct it. Moreover, given the ad hoc nature of the inquiry, the President might be uncertain ex ante what sort of deference she would receive, which might unjustifiably decrease (or increase) the incentive to ensure rigorous process was used in the factfinding in question. Finally, there are likely to be areas where the different metrics point in different directions. For example, to the extent accountability is premised on the public effectively overseeing presidential factfinding, this justification might be least appropriate in the foreign affairs and national security context, where the public has relatively little access to the relevant information, warranting less deference. But these authorities may be most likely to implicate the President's particular epistemic advantages, warranting more deference. Yet it is not clear what the court should do when these rationales conflict. These tensions are not necessarily irreconcilable,<sup>335</sup> but the complexity of the framework ought to give us pause. Although this approach may be the most nuanced, it would also likely be the most difficult to implement.

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likely to be empirically verifiable than such general facts. *See, e.g.*, 3 DAVIS, *supra* note 12, § 15:3, at 145.

332. *Cf.* 3 DAVIS, *supra* note 12, § 15:10, at 179 (suggesting less evidence is needed for “judgmental facts”).

333. *Cf.* Araiza *supra* note 28, at 902 (discussing substantive dimension of congressional factfinding review).

334. *See, e.g.*, Chesney, *supra* note 10, at 1411.

335. *See, e.g.*, Berger, *supra* note 329, at 2082 (suggesting deference in such cases would “often be in the middle—neither especially rigorous nor especially forgiving”).

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Above, I have set forth three potential approaches for judicial review of presidential factfinding. The different approaches have distinct benefits and costs. The process-based approach is likely to incentivize the President to use her epistemic advantages in finding facts, but because it would not meaningfully substantively evaluate the ultimate determination, it would leave substantial room for presidential discretion (and potentially abuse). The hard look approach would also incentivize the use of process but would in addition require some sort of reason-giving and potentially apply a more rigorous form of substantive review. But this form of review would impose more burdens on the President and might create greater danger of courts illegitimately substituting their views for the President's where the authority is validly justified on expertise or accountability rationales. The contextual approach would seek to carefully calibrate deference to match the presence or absence of the President's advantages in finding particular facts. But this nuanced approach would create greater room for error and judicial manipulation, as well as less clear ex ante incentives for the President to engage in a rigorous factfinding process. Determining which form of judicial review is optimal is thus a complex endeavor that will depend on one's calculations of the relative weights of these benefits and costs.

Because I do not have space to fully assess these costs and benefits, my recommendation is necessarily preliminary. But, at least as a preliminary matter, process-based deference seems like the most desirable, realistic starting point. Process-based deference would have the benefit of encouraging the President to use her epistemic advantages in order to receive deference to her factual findings. Although, such an approach would impose some costs on the President's decisionmaking, those costs do not seem overly onerous in relation to the benefits of the increased rigor within the executive branch that such deference would incentivize.<sup>336</sup> Indeed, given that much of the deference in this context is predicated on the President's epistemic advantages, it seems not too much to ask that those advantages be utilized before deferring.

Some might be disappointed that process-based review would not engage in sufficiently rigorous substantive review of the factual determination. But the question in these cases will always be one of degree. Unless one wishes that courts find presidential facts de novo,

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336. Cf. Bruff, *supra* note 10, at 46 (noting costs of certain process would be "tolerable, although they are not insignificant" in light of benefits).

then some amount of deference will be required. Although the accommodation under process-based deference is certainly not perfect, it seems like a reasonable compromise to begin with. And it is worth remembering that process-based deference would still leave room for reversal of extreme examples of faulty factfinding. Such deference need only be “up to a point.”<sup>337</sup>

Proponents of a hard look approach might be particularly disappointed, but whatever its merits, hard look review seems unrealistic in the short term. This form of review has not been required of the President in modern times, and the Court recently cast serious doubt on its use in the Travel Ban ruling.<sup>338</sup> That said, for proponents of hard look review, process-based deference might be a step in the right direction. Although it would not require the President to formally articulate a rationale connecting the evidence to the factual determination, it would serve many of the same functions of incentivizing internal process that hard look review seeks to serve.<sup>339</sup> Moreover, if process-based deference is used in any sort of systematic fashion without great harmful effect, it might soften some of the ossification objections to hard look review. Similarly, process-based deference might be able to adopt some of the insights from the contextual approach while limiting some of its downsides by, for example, reviewing more verifiable facts more closely than less verifiable facts without becoming fully ad hoc.

Unfortunately, there is no perfect solution for how courts ought to review presidential factfinding. What seems desirable is that *some*

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337. See Larsen, *supra* note 12, at 235 (such deference could still “sniff out” easily rebuttable false “facts”).

338. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (describing as “questionable” the notion that the President is required to “explain [his relevant] . . . finding with sufficient detail to enable judicial review”). It is not clear whether the Court would think of the requirement differently outside of the national security context, but its tone certainly casts doubt on the likelihood of it sanctioning a general form of hard look review for presidential exercises of authority in the near future. *Id.*; see also Manheim & Watts, *supra* note 17 (manuscript at 75):

It would be difficult for the courts to apply a robust form of arbitrary-and-capricious review (akin to hard look review) to presidential orders without also effectively demanding more of the Presidents who are issuing those orders: perhaps technocratic justifications, or detailed records, or more. These de facto requirements could, in turn, raise serious separation-of-powers concerns; the judiciary might be seen as impermissibly micromanaging the President’s decisionmaking process or otherwise compromising the Constitution’s separation of powers.

339. *Cf.* Larsen, *supra* note 12, at 235 (suggesting the basic idea behind both forms of review is that “when more process is used beforehand we can assume the decision will be better and thus it is more worthy of deference”).

coherent approach be used in reviewing presidential factfinding.<sup>340</sup> To date, no such approach has emerged. Hopefully this discussion will help to spur one.

At bottom, though, it is worth remembering that judicial review is only one piece of the puzzle. The vast majority of power exercised pursuant to presidential factfinding is unlikely to be subject to judicial review. So, while judicial review is important, it cannot, on its own, ensure that the President abides by her positive and normatively desirable obligations in finding facts.

#### CONCLUSION

In 1939, then-Attorney General, and later Supreme Court Justice, Frank Murphy wrote: “The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.”<sup>341</sup> In short, *facts matter*. Presidential factfinding pervades nearly every substantive domain of presidential power, and how it is done can make the difference between the President having power and lacking it. Yet, despite the extensive literature on presidential power, scholars have failed to focus on this feature. This Article submits that this is a mistake. To put it simply, we cannot understand the scope of the President’s power if we do not understand how she finds facts.

In this Article, I have sought to address the most pressing issues raised by presidential factfinding by establishing how pervasive the phenomenon is, identifying the President’s existing legal obligations in finding facts, and making progress in figuring out how presidential factfinding ought to be regulated. But many projects remain. For example, we still lack a full account of how the President currently finds facts, and certainly more progress can be made in identifying how she ought to do so. And going forward, we ought to incorporate questions about how the President does or ought to find facts into debates about the scope of the President’s power that have thus far largely revolved around determining which facts authorize her to act. Switching from the President to Congress, future work might help us better understand why Congress delegates factfinding power specifically to the President rather than administrative agencies at all, as well as when such delegations are normatively desirable. Relatedly, recognizing that the

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340. Cf. Manheim & Watts, *supra* note 17 (manuscript at 7, 52–53) (noting the need for a “cohesive framework to guide judicial review of presidential orders,” which would help decrease uncertainty and inconsistency and increase the quality of judicial review).

341. Request of the Senate for an Opinion as to the Powers of the President “In Emergency or State of War,” 39 Op. Att’y Gen. 343, 347–48 (1939).



President is a factfinder might open up new lines of inquiry into factfinding *across* the branches. Congress, courts, agencies, and, we now know, the President all regularly find facts, but we lack an account of how factfinding is or ought to be allocated among these actors. While this Article certainly cannot address all the projects raised by the phenomenon of presidential factfinding, the hope is to spur scholarly interest in doing so. The President is a factfinder. We should start treating her that way.